SUPREME COURT OF THE UNITED STATES.

No. 302.

AUSTIN CORBIN, GEORGE S. C. DOW, THE NEW YORK & MANHATTAN BEACH RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

CATHERINE VAN BRUNT AND ABRAHAM VAN BRUNT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Summons	1	1
Complaint	2	1
Answer of defendant Corbin	6	3
Dow	10	4
The New York and Manhattan Beach Railway Company	12	4
Keefer	18	6
McKinnie	24	8
Burnap	30	10
Notice of trial	36	11
Petition to remove to United States court	38	12
Order removing to United States court	44	13
Notice of motion to remand to State court	47	14
Affidavit of Andrew G. Cropsey	49	15
Further affidavit of A. G. Cropsey	54	17
Affidavit of Alfred C. Chapin	63	19
Order remanding cause	66	20
Opinion of Benedict, J	70	21
Writ of error	72	22
Bond	75	22
Certificate of clerk	79	24
Citation (original)	80	24
Assignment of error (original)	82	25

1 *Summons.*

Supreme court, county of Kings.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT, plaintiff,
against
AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap, defendants.
} Place of trial, county of Kings.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated January 22d, 1878.

ANDREW G. CROPSEY,
Plaintiffs' Attorney.

Post-office address, New Utrecht, Kings County, N. Y.; office, Cowenhoven avenue, New Utrecht, Kings County, N. Y.

2 Supreme court, county of Kings.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT, plaintiffs,
ag'st
AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnse, and Uzziah C. Burnap.
} Place of trial.

The complaint of the above-named plaintiffs respectfully shows to this court:

I. That Jeremiah Van Brunt, late of the town of New Utrecht, county of Kings, and Abigail Van Brunt (his sister), also late of the said town and county, at and for many years next previous to the time of their respective deaths, were seized in fee-simple each of an equal undivided half part thereof, and until the time of the unlawful entry hereinafter mentioned, in the lawful possession of the following-described real property and premises, viz: All that certain large sedge lot, piece, or parcel of land, situates, lying, and being in the east division in the sedge bank, so called, in the town of Gravesend, upon an island now called Coney Island, in the county of Kings, and State of New York, and being known and distinguished by the number twenty-six, as recorded
3 in the town records of said town, reference being thereunto had will more at large appear, the same being bounded easterly by lot number twenty-seven, in said sedge bank, lately belonging to Jacobus Van Hoise; westerly by lot number twenty-five, in said sedge bank, lately belonging to Jacobus Ryder; southerly one chain and seventeen links upon the sea or Atlantic Ocean, and northerly one chain

and thirty links by the cove, formerly so called, now known as the waters of Sheepshead Bay.

II. That being so seized and possessed the said Jeremiah Van Brunt died in said town of New Utrecht, on the seventeenth day of January, 1869, leaving a last will and testament, dated the twenty-fifth day of September, 1858, which was duly proved as a will of real estate before the surrogate of said county of Kings, on the 24th day of February, 1869, whereby he devised the said equal undivided half part of said real property and premises to his wife, the plaintiff, Catharine Van Brunt, while she remained his widow, and under which will the fee of said equal undivided half part descended to the plaintiff Abraham Van Brunt, and to Jeremiah Van Brunt (junior), sons of said testator, share and share alike, subject to the use and occupancy of the said plaintiff Catharine Van Brunt, who remains the widow of said testator.

4 That the said Jeremiah Van Brunt (junior), died intestate on the second day of November, 1876, leaving him surviving his widow Mary L. Van Brunt, and Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt, and Sidney Van Brunt, his only children and heirs at law, who are severally infants under the age of fourteen years.

III. That being seized and possessed as aforesaid the said Abigail Van Brunt died in the said town of New Utrecht on the sixteenth day of September, 1877, intestate, unmarried, and without issue, and leaving the plaintiff Abraham Van Brunt and Aletta V. B. Wright (also a child of said Jeremiah Van Brunt, the older), and the said infants Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt, and Sidney Van Brunt, her only heirs at law, her surviving.

IV. That the plaintiff Catharine Van Brunt was and is seized of and entitled to a life estate in the equal undivided half part of said real property, and the plaintiff Abraham Van Brunt was and is seized in fee of and entitled to fifteen equal undivided thirty-sixth parts of the said real property, subject to the life estate of the plaintiff Catharine Van Brunt, in nine equal undivided thirty-sixth parts thereof, and the plaintiffs are entitled to the possession of the whole of said real property and premises.

5 V. That on or about the first day of February, 1877, the defendants unlawfully entered into and now are in possession and actual occupancy of the said real property and premises, without leave of the plaintiffs or either of them, or any right or title thereto, and the defendants, although they have been duly requested, refuse to give up the possession and unlawfully withhold possession thereof from the plaintiffs, to their damage one thousand dollars.

VI. That the value of the use and occupancy of said real property and premises since the said first day of February, 1877, and while the plaintiffs have been excluded therefrom by the defendants is fifteen hundred dollars, which is the yearly value of the use and occupation thereof:

Wherefore the plaintiffs demand judgment against the said defendants.

1. For the possession of the said real property and premises above described.

2. For one thousand dollars, the plaintiffs' damages by reason of the withholding of the same.

3. For fifteen hundred dollars, as the value of the use and occupation of said real property and premises, and at the rate of fifteen hundred dollars per year down to the date of recovery.

4. For the costs and disbursements of this action.

ANDREW G. CROPSEY,
Plaintiffs' Attorney, New Utrecht, Kings County, N. Y.

6 Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT *ag'st* AUSTIN CORBIN AND OTHERS.

The defendant, Austin Corbin, answering the complaint herein, respectfully shows to this court.

First. As to the first subdivision of the complaint herein, this defendant denies the same, and each and every allegation therein contained.

Second. This defendant, further answering the complaint, denies each and every allegation in the second subdivision of said complaint, except so much of said second subdivision of said complaint as is contained in the words following, to wit: That the said Jeremiah Van Brunt (junior, died intestate on the second day of November, 1876, leaving him surviving his widow, Mary L. Van Brunt, and Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt, and Sidney Van Brunt, his only children and heirs at law, who are severally infants under the
7 age of fourteen years, as to which portion of said second subdivision this defendant denies having any knowledge or information sufficient to form a belief, and therefore denies the same.

Third. As to the third subdivision of the complaint, this defendant further answering denies all allegations therein contained which assert or imply, or are intended to assert or imply, any seizen or possession on the part of Abigail Van Brunt therein mentioned, of the premises described in the complaint, or any portion or interest in the same; and as to the remainder of said third subdivision this defendant denies any knowledge or information sufficient to form a belief as to the allegations in said remainder, and therefore denies the said allegations contained in the remainder of said third subdivision of the complaint.

Fourth. This defendant, further answering, denies each and every allegation contained in the fourth subdivision of the complaint.

Fifth. This defendant, further answering, says, as to the allegations contained in the fifth subdivision of the complaint, that he admits that the defendant The New York and Manhattan Beach Railway Company are now in the possession and occupacy of the premises described
8 in the complaint, but denies each and every other allegation in said fifth subdivision contained.

Sixth. This defendant, further answering the complaint, denies all knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth subdivision thereof, and therefore denies the same.

Seventh. This defendant, further answering, alleges that on the 27th day of September, 1876, in an action for the partition and sale of the premises described in the complaint, brought in the supreme court in the county of Kings, in which action the defendant Austin Corbin herein was plaintiff, and one J. Baxter Upham and Mrs. Upham, his wife, Charles L. Flint, Isaac D. Farnsworth, Edmund R. Peaslee and Mrs. Peaslee, his wife, and all other persons unknown to the plaintiff in said suit owning or claiming any interest in the said premises

were defendants, judgment was duly given that the said premises be sold at public auction to the highest bidder; that under and in pursuance of said judgment and decree the said premises were duly sold by N. H. Clement, esq., referee, to George S. C. Dow, on the 11th day of November, 1876, and that upon the 21st day of November, 1876, an order of this court was duly entered whereby said sale was ratified, approved, and confirmed, and said referee was ordered to execute a conveyance of said premises to the said George S. C. Dow, that such conveyance was duly executed upon the 21st day of November, 1876, and was duly recorded upon the 7th day of December, 1876, in the office of the register of Kings County, and this defendant insists that said conveyance and judgment constitute a bar against the plaintiffs herein.

Wherefore this defendant demands judgment that the complaint herein be dismissed with costs.

New York, March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Def't Austin Corbin.

(Indorsed:) Supreme court, Kings Co. Catharine Van Brunt and Abraham Van Brunt vs. Austin Corbin and others. Answer of Austin Corbin. Alfred C. Chapin, def't' att'y, 61 B'way, N. Y. City.

Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT
against
AUSTIN CORBIN AND OTHERS.

The defendant George S. C. Dow, answering the complaint herein respectfully shows to this court—

First. He denies each and every allegation contained in the complaint.

Wherefore this defendant demands that the complaint herein be dismissed with costs.

N. Y., March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Defendant, George S. C. Dow.

(Indorsed:) Supreme court Kings Co. Catharine Van Brunt, Abraham Van Brunt vs. Austin Corbin and others. Answer Geo. S. C. Dow. Alfred C. Chapin, att'y for the def't., 61 B'way, N. Y. City.

Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT
ag'st
AUSTIN CORBIN AND OTHERS.

The defendant The New York and Manhattan Beach Railway Company, answering the complaint herein, respectfully shows to this court—

First. As to the first subdivision of the complaint herein, this de-

fendant denies the same and each and every allegation therein contained.

Second. This defendant, further answering, the complaint denies each and every allegation contained in the second subdivision of the complaint, except so much of said second subdivision of said complaint as is contained in the words following, to wit: "That the said Jeremiah Van Brunt (junior) died intestate on the second day of November, 1876, leaving him surviving his widow, Mary L. Van Brunt and Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt and Sidney Van Brunt his only children and heirs-at-law, who are severally infants under the age of fourteen years," as to which portion of said second
13 subdivision this defendant denies having any knowledge or information sufficient to form a belief, and therefore denies the same.

Third. As to the third subdivision of the complaint this defendant further answering denies all allegations or language therein contained which assert or imply or are intended to assert or imply any seizing or possession on the part of Abigail Van Brunt therein mentioned, of the premises described in the complaint or of any portion or interest in the same; and as to the remainder of said third subdivision, this defendant denies having any knowledge or information sufficient to form a belief as to the allegations in said remainder, and therefore denies the said allegations contained in the remainder of said third subdivision of the complaint.

Fourth. This defendant, further answering, denies each and every allegation contained in the fourth subdivision of the complaint.

Fifth. This defendant further answering, says, as to the allegations contained in the fifth subdivision of the complaint, that he admits that the defendants The New York and Manhattan Beach Railway Company are now in the possession and occupancy of the premises
14 described in the complaint, but denies each and every other allegation in said fifth subdivision contained.

Sixth. This defendant, further answering the complaint, denies all knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth subdivision, and therefore denies the same.

Seventh. This defendant' further answering, alleges that on the 27th day of September, 1876, in an action for the partition and sale of the premises described in the complaint brought in the supreme court in the county of Kings, in which action the defendant Austin Corbin herein was plaintiff, and one J. Baxter Upham and Mrs. Upham, his wife, Charles L. Flint, Isaac D. Farnsworth, Edmund R. Peaslee, and Mrs. Peaslee, his wife, and all other persons unknown to the plaintiff in said suit owning or claiming any interest in the premises were defendants, judgment was duly given that the said premises be sold at auction to the highest bidder. That under and in pursuance of said judgment and decree, the said premises were duly sold by N. H. Clement, esq., referee, to George S. C. Dow, on the 11th day of November, 1876, and that upon the 21st day of November, 1876, an order of
15 this court was duly entered, whereby said sale was ratified, approved, and confirmed, and said referee was ordered to execute a conveyance of the said premises to the said George S. C. Dow; that such conveyance was duly executed upon the 21st day of November, 1876, and was duly recorded upon the 7th day of December, 1876, in the office of the register of Kings County, and this defendant insists that said conveyance and judgment constitute a bar against the plaintiffs.

Eighth. This defendant, further answering alleges, that the defendant The New York and Manhattan Beach Railway Company is a corporation, duly incorporated under the laws of the State of New York, and possessing the power to hold and convey real estate. That long before the commencement of this action, that is to say, on or about the first day of February, 1877, the said defendant The New York and Manhattan Beach Railway Company being then incorporated as aforesaid and possessing the aforesaid power, became and were lawfully seized in fee of all and singular the land and premises in the said complaint described, with the appurtenances, and entitled unto and possessed of the same in their sole and absolute right, and from thence at
16 all times down to the time of the commencement of this action have continued to be and still continue to be so seized in fee of every part and parcel, and entitled unto and possessed of the same in their own sole and absolute right; and this defendant denies that the defendants, Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap, were, at the time of the commencement of this action or now or ever were in the occupation of the said lands and premises or any part or parts thereof.

Wherefore this defendant demands judgment that the complaint herein be dismissed with costs.

New York March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Def't., The N. Y. and M. B. R. R. Co.

17 (Indorsed:) Supreme court, Kings County. Catharine Van Brunt and Abraham Van Brunt vs. Austin Corbin and others. Answer The N. Y. and M. B. R'y Co. Alfred C. Chapin, def'ts' att'y, 61 Broadway, N. Y. City.

18 Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT
agst.
AUSTIN CORBIN AND OTHERS.

The defendant Samuel Keefer, answering the complaint herein, respectfully shows to this court:

First. As to the first subdivision of the complaint herein, this defendant denies the same and each and every allegation therein contained.

Second. This defendant, further answering the complaint, denies each and every allegation contained in the second subdivision of the complaint, except so much of said second subdivision of said complaint as is contained in the words following, to wit: "That the said Jeremiah Van Brunt, junior, died intestate on the second day of November, 1876, leaving him surviving his widow Mary L. Van Brunt, Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt, and Sidney Van Brunt, his only children and heirs at law, who are severally infants
19 under the age of fourteen years," as to which portion of said second subdivision this defendant denies having any knowledge or information sufficient to form a belief, and therefore denies the same.

Third. As to the third subdivision of the complaint this defendant, further answering, denies all allegations or language therein contained which assert or imply, or are intended to assert or imply any seizin or pos-

session on the part of Abigail Van Brunt therein mentioned of the premises described in the complaint, or of any portion or interest in the same; and as to the remainder of said third subdivision this defendant denies having any knowledge or information sufficient to form a belief as to the allegations in said remainder, and therefore denies the said allegations contained in the remainder of said third subdivision of the complaint.

Fourth. This defendant, further answering, denies each and every allegation contained in the fourth subdivision of the complaint.

Fifth. This defendant, further answering, says to the allegations contained in the fifth subdivision of the complaint that he admits that the defendants The New York and Manhattan Beach Railway Company are now in the possession and occupancy of the premises described in the complaint, but denies each and every other allegation in said fifth subdivision contained.

Sixth. This defendant further answering the complaint, denies all knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth subdivision, and therefore denies the same.

Seventh. This defendant further answering alleges that on the 27th day of September, 1876, in an action for the partition and sale of the premises described in the complaint, brought in the supreme court of the county of Kings, in which action the defendant Austin Corbin herein was plaintiff, and one J. Baxter Upham and Mrs. Upham his wife, Charles L. Flint, Isaac D. Farnsworth, Edmund R. Peaslee, and Mrs. Peaslee his wife, and all other persons unknown to the plaintiff in said suit, owning or claiming any interest in the premises were defendants, judgment was duly given that the said premises be sold at public auction to the highest bidder. That under and in pursuance of said judgment and decree, the said premises were duly sold by N. H. Clement, esq., referee, to George S. C. Dow, on the 11th day of November, 1876, and that upon the 21st day of November, 1876, an order of this court was duly entered, whereby said sale was ratified, approved and confirmed, and said referee was ordered to execute a conveyance of the said premises to the said George S. C. Dow, that such conveyance was duly executed upon the 21st day of November, 1876, and was duly recorded upon the 7th day of December, 1876, in the office of the register of Kings County, and this defendant insists that said conveyance and judgment constitute a bar against the plaintiffs.

Eighth. This defendant further answering, alleges that the defendant The New York and Manhattan Beach Railway Company is a corporation, duly incorporated under the laws of the State of New York, and possessing the power to hold and convey real estate. That long before the commencement of this action, that is to say, on or about the 1st day of February, 1877, the said defendant The New York and Manhattan Beach Railway Company being then incorporated as aforesaid, and possessing the aforesaid power, became and were lawfully seized in fee of all and singular the land and premises in the said complaint described, with the appurtenances, and entitled and possessed of the same in their sole and absolute right, and from thence at all times down to the time of the commencement of this action have continued to be, and still continue to be, so seized in fee of every part and parcel, and entitled unto and possessed of the same in their own sole and absolute right; and this defendant denies that the defendants Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap, were at the time of the commencement of this action or now or

ever were in the occupation of the said lands and premises, or any part or parts thereof. Wherefore this defendant demands judgment that the complaint herein be dismissed with costs.

New York, March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Def't. Samuel Keefer.

23 (Indorsed:) Supreme court, Kings Co. Catharine Van Brunt and Abraham Van Brunt, agst. Austin Corbin and others. Answer of Samuel Keefer. Alfred C. Chapin, att'y for the def't., 61 B'way, N. Y. City.

24 Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT *agst.* AUSTIN CORBIN AND OTHERS.

The defendant Henry McKinnie, answering the complaint herein, respectfully shows to this court—

First. As to the first subdivision of the complaint herein, this defendant denies the same and each and every allegation therein contained.

Second. This defendant, further answering the complaint, denies each and every allegation contained in the second subdivision of the complaint, except so much of said second subdivision of said complaint as is contained in the words following, to wit, "that the said Jeremiah Van Brunt, junior, died intestate on the second day of November, 1876, leaving him surviving his widow, Mary L. Van Brunt, and Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt, and Sidney Van Brunt, his only children and heirs at law, who are severally in-
25 fants under the age of fourteen years." As to which portion of said second subdivision, this defendant denies having any knowledge or information sufficient to form a belief, and therefore denies the same.

Third. As to the third subdivision of the complaint this defendant, further answering, denies all allegations or language therein contained which assert or imply, or are intended to assert or imply any seizin or possession on the part of Abigail Van Brunt therein mentioned of the premises described in the complaint, or of any portion or interest in the same, and as to the remainder of said third subdivision this defendant denies having any knowledge or information sufficient to form a belief as to the allegations in said remainder, and therefore denies the said allegations contained in the remainder of said third subdivision of the complaint.

Fourth. This defendant, further answering, denies each and every allegation contained in the fourth subdivision of the complaint.

Fifth. This defendant, further answering, says as to the allegations contained in the fifth subdivision of the complaint that he admits that the defendants The New York and Manhattan Beach Railway
26 Company are now in the possession and occupancy of the premises described in the complaint, but denies each and every other allegation in said fifth subdivision contained.

Sixth. This defendant, further answering the complaint, denies all knowledge or information sufficient to form a belief as to the truth of

the allegations contained in the sixth subdivision, and therefore denies the same.

Seventh. This defendant, further answering, alleges that on the 27th day of September, 1876, in an action for the partition and sale of the premises described in the complaint brought in the supreme court of the county of Kings, in which action the defendant, Austin Corbin, herein was plaintiff, and one J. Baxter Upham, and Mrs. Upham, his wife, Charles L. Flint, Isaac D. Farnsworth, Edmund R. Peaslee, and Mrs. Peaslee, his wife, and all other persons unknown to the plaintiff in said suit owning or claiming any interest in the premises were defendants, judgment was duly given that the said premises be sold at public auction to the highest bidder; that under and in pursuance of said judgment and decree the said premises were duly sold by
27 N. H. Clement, esq., referee, to George S. C. Dow on the 11th day of November, 1876, and that upon the 21st day of November, 1876, an order of this court was duly entered whereby said sale was ratified, approved, and confirmed, and said referee was ordered to execute a conveyance of the said premises to the said George S. C. Dow; that such conveyance was duly executed upon the 21st day of November, 1876, and was duly recorded upon the seventh day of December, 1876, in the office of the register of Kings County, and this defendant insists that said conveyance and judgment constitute a bar against the plaintiffs.

Eighth. This defendant, further answering, alleges that the defendant The New York and Manhattan Beach Railway Company is a corporation, duly incoporated under the laws of the State of New York, and possessing the power to hold and convey real estate; that long before the commencement of this action, that is to say, on or about the 1st day of February, 1877, the said defendant The New York and Manhattan Beach Railway Company being then incorporated as aforesaid and possessing the aforesaid power, became and were lawfully seized
28 in fee of all and singular the land and premises in the said complaint described, with the appurtenances, and entitled and possessed of the same in their sole and absolute right, and from thence at all times down to the time of the commencement of this action, have continued to be and still continue to be so seized in fee of every part and parcel, and entitled unto and possessed of the same in their own sole and absolute right; and this defendant denies that the defendants, Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap, were at the time of the commencement of this action, or now or ever were in the occupation of the said lands and premises or any part or parts thereof.

Wherefore this defendant demands judgment; that the complaint herein be dismissed with costs.

New York, March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Def't Henry McKinnie.

29 (Indorsed:) Supreme court, Kings Co. Catharine Van Brunt and Abraham Van Brunt ag'st Austin Corbin and others. Answer of Henry McKinnie. Alfred C. Chapin, att'y for the def't, 61 B'way, N. Y. City.

30 Supreme court, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT *ag'st* AUSTIN CORBIN AND OTHERS.

The defendant Uzziah C. Burnap, answering the complaint herein, respectfully shows to this court:

First. As to the first subdivision of the complaint herein, this defendant denies the same and each and every allegation therein contained.

Second. This defendant, further answering the complaint, denies each and every allegation contained in the second subdivision of the complaint except so much of said second subdivision of said complaint as is contained in the words following, to wit: "That the said Jeremiah Van Brunt, junior, died intestate, on the second day of November, 1876, leaving him surviving his widow, Mary L. Van Brunt, and Jeremiah Van Brunt, John L. Van Brunt, Anna Van Brunt and Sidney Van Brunt, his only children and heirs at law, who are severally in-
31 fants under the age of fourteen years," as to which portion of said second subdivision, this defendant denies having any knowledge or information sufficient to form a belief, and therefore denies the same.

Third. As to the third subdivision of the complaint, this defendant, further answering, denies all allegations or language therein contained which assert or imply or are intended to assert or imply any seizin or possession on the part of Abigail Van Brunt, therein mentioned of the premises described in the complaint or of any portion or interest in the same, and as to the remainder of said third subdivision this defendant denies having any knowledge or information sufficient to form a belief as to the allegations in said remainder, and therefore denies the said allegations contained in the remainder of said third subdivision of the complaint.

Fourth. This defendant, further answering, denies each and every allegation contained in the fourth subdivision of the complaint.

Fifth. This defendant, further answering, says as to the allegations contained in the fifth subdivision of the complaint that he admits that the defendants The New York and Manhattan Beach Railway
32 Company are now in the possession and occupancy of the premises described in the complaint, but denies each and every other allegation in said fifth subdivision contained.

Sixth. This defendant, further answering the complaint, denies all knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth subdivision, and therefore denies the same.

Seventh. This defendant, further answering, alleges that, on the 27th day of September, 1876, in an action for the partition and sale of the premises described in the complaint brought in the supreme court of the county of Kings, in which action the defendant Austin Corbin herein was plaintiff, and one J. Baxter Upham and Mrs. Upham, his wife, Charles L. Flint, Isaac D. Farnsworth, Edmund R. Peaslee, and Mrs. Peaslee, his wife, and all other persons unknown to the plaintiff in said suit owning or claiming any interest in the premises were defendants, judgment was duly given that the said premises be sold at public auction to the highest bidder. That under and in pursuance of said judgment and decree the said premises were duly sold by N.

H. Clement, esq., referee, to George S. C. Dow, on the 11th day
33 of November, 1876, and that, upon the 21st day of November, 1876, an order of this court was duly entered whereby said sale was ratified, approved, and confirmed, and said referee was ordered to execute a conveyance of the said premises to the said George S. C. Dow; that such conveyance was duly executed upon the 21st day of November, 1876, and was duly recorded upon the 7th day of December, 1876, in the office of the register of the county of Kings, and this defendant insists that said conveyance and judgment constitute a bar against the plaintiffs.

Eighth. This defendant, further answering, alleges that the defendant The New York and Manhattan Beach Railway Company is a corporation, duly incorporated under the laws of the State of New York, and possessing the power to hold and convey real estate. That long before the commencement of this action, that is to say, on or about the first day of February, 1877, the said defendant The New York and Manhattan Beach Railway Company, being the' incorporated as aforesaid and possessing the aforesaid power, became and were lawfully seized in fee of all and singular the land and premises in the said
34 complaint described, with the appurtenances, and entitled and possessed of the same in their sole and absolute right, and from thence at all times down to the time of the commencement of this action have continued to be and still continue to be so seized in fee of every part and parcel and entitled unto and possessed of the same in their own sole and absolute right; and this defendant denies that the defendants, Samuel Keefer, Henry McKinnie and Uzziah C. Burnap, were at the time of the commencement of this action or now or ever were in the occupation of the said lands and premises or any part or parts thereof.

Wherefore this defendant demands judgment that the complaint herein be dismissed with costs.

New York, March 18th, 1878.

ALFRED C. CHAPIN,
Att'y for the Def't Uzziah C. Burnap.

35 (Indorsed:) Supreme court, Kings Co. Catharine Van Brunt and Abraham Van Brunt ag'st Austin Corbin and others. Answer U. C. Burnap. Alfred C. Chapin, att'y for the def't, 61 Broadway, N. Y.

36 *Notice of trial.*

New York supreme court, Kings County.

CATHARINE VAN BRUNT & ANO'R, PL'FFS.,
vs.
AUSTIN CORBIN & O'RS, DEF'TS.

Please to take notice that the issue of fact in this action will be brought to trial and an inquest taken therein at the next circuit court appointed to be held in and for the county of Kings, at the Kings County court-house of the city of Brooklyn, on the first Monday of May, 1878, at ten o'clock in the forenoon of the same day.

Dated the 17th day of April, 1878.

ANDREW G. CROPSEY,
Attorney for Pl'ffs, New Utrecht, N. Y.

To ALFRED CHAPIN, Esq.,
Attorney for Def'ts. 61 Broadway, N. Y.

37 (Indorsed:) New York supreme court, Kings Co'y. Catharine Van Brunt & o'r against Austin Corbin & o'rs. Notice of trial. For May term, 1878. Andrew G. Cropsey, pl'ffs' attorney. Due service of the within notice is hereby admitted. Dated New York, , 18 . , attorney. To Alfred C. Chapin, esq., def'ts' att'y, 61 B'way, N. Y.

38 Supreme court, county of Kings.

CATHERINE VAN BRUNT AND ABRAHAM VAN BRUNT *ag'st* AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinney, and Uzziah C. Burnap.

To the supreme court of the State of New York:

The petition of Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap respectfully shows:

That your petitioners are the defendants in this action.

That your said petitioner Samuel Keefer is, and has been for upwards of two years last past, and was at the time of the commencement of this action, and has been ever since, a citizen and resident of the State of Ohio.

That your said petitioner Henry McKinnie is, and has been
39 for upwards of two years last past, and was at the time of the commencement of this action, and has been ever since, a resident and citizen of the State of Indiana.

That the above named Catherine Van Brunt and Abraham Van Brunt, plaintiffs herein, are, and were at the time of the commencement of this action, and have been ever since, citizens and residents of the town of New Utrecht, Kings County, State of New York, and that there is a controversy in this cause between citizens of different States.

That this action was commenced on or about the 24th day of January, 1878, against your petitioners by service of the summons and complaint on that day on the defendants herein.

That this action is brought by the plaintiffs to recover the possession of certain real property described in the complaint, and also to recover one thousand ($1,000) dollars damages for the withholding of the said real property, and also to recover the sum of fifteen hundred ($1,500) dollars as the value of the use and occupation of said real property, which the plaintiffs allege is the value of the use and occupation
40 of said real property while they have been excluded therefrom by the defendants.

That the said action was put at issue by the service of an answer herein by each defendant separately on the 20th day of March, 1878, and has been pending since that time, and is now pending; that this suit is of a civil nature at law, and that the matter in dispute therein exceeds, exclusive of costs, the sum or value of five hundred dollars, and that there is a controversy herein which is wholly between citizens of different States, and which can be fully determined as between them.

And your petitioner further shows that this cause has not been tried and has not been reached upon the calender, and that the next term of

this court will commence on the first Monday of May next, and that this cause cannot be tried before the said May term. Your petitioners therefore pray for the removal of this cause into the circuit court of the United States of America to be held in and for the second circuit and eastern district of New York, pursuant to the act of Congress in such cases made and provided, and they now offer here good and sufficient surety for their entering in the said circuit court on the
41 first day of its next session a copy of the record in the said suit and for paying all costs that may be awarded by the said circuit court, if the said court shall hold that the said suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in the said suit, if special bail was originally requisite therein, and pray that this petition and the said bond be accepted and this court proceed no further in this suit.

THE N. Y. & M. BEACH RAILWAY CO.,
By A. CORBIN, *P't.*
A. CORBIN.
GEO. S. C. DOW.
SAMUEL KEEFER.
H. McKINNEY.
UZZIAH C. BURNAP.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

U. C. Burnap, being duly sworn, says that he is one of the defendants and petitioners above named; that he has read the foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

U. C. BURNAP.

Sworn to before me this 23d day of April, 1878.
F. K. PENDLETON,
Notary Public, N. Y. Co.

42, 43 (Indorsed:) Superior court, Kings Co. Catherine Van Brunt et al. ag'st Austin Corbin et al. Petition to remove cause to U. S. circuit. Alfred C. Chapin, def'ts' att'y, 61 B'way, N. Y.

44 *Affidavit of service of summons and complaint.*

Supreme court, Kings Co.

CATHARINE VAN BRUNT AND ANOTHER, plaintiff,
against
AUSTIN CORBIN AND OTHERS, DEFENDANT.

CITY AND COUNTY OF NEW YORK:

Charles Fowler, being duly sworn, says that he is of the age of 21 years, and that on the 4th day of May, 1878, at New Utrecht, Kings Co., L. I., he served the annexed order, which is also hereunto annexed, on Andrew G. Cropsey, jr., pl'ffs' att'y in this action, by delivering a copy

of the same to A. G. Cropsey, said att'y' father, personally, and leaving the same with him. He further says that he knew the person served as aforesaid.

CHARLES FOWLER.

Sworn to before me this 6th day of May, 1878.

GO. S. C. DOW,
Notary Public, Kings Co., Acting in N. Y. Co.

45 At a special term of the supreme court of the State of New York, held at the City Hall in the city of New York on the 4th day of May, 1878:

Present, Hon. Charles Donohue, justice.

CATHERINE VAN BRUNT AND ABRAHAM Van Brunt
vs.
AUSTIN CORBIN AND OTHERS.

On reading and filing the bond and petition herein for the removal of this cause to the circuit court of the United States of the eastern district of New York, and the said petitioner having offered good and sufficient security pursuant to the directions of and as required by the statutes of the United States in such case made and provided: Now, on motion of Alfred C. Chapin, esq., of counsel for the petitioners, it is ordered—

That this court accepts the surety offered by the petitioners, and that the said cause be removed for trial into the circuit court of the United States in and for the eastern district of New York, pursuant to
46 the said statutes, and that this court do proceed no farther therein.

CHAS. DONOHUE, *Justice.*

A copy:

JOHN DELMAR,
Clerk of Kings Co.

(Endorsed:) Filed May 4, 1878.

(Indorsed:) New York supreme court. Catherine Van Brunt and Abraham Van Brunt vs. Austin Corbin and others. Copy & order removing cause. File all papers in Kings Co., C. D.

Due service of a copy of the order of which within is a certified copy is this day admitted.

May , 1878.

47 In the circuit court of the United States for the second circuit and eastern district of New York, on removal from the supreme court of the State of New York, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN Brunt, plaintiffs,
against
AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinney, and Uzziah C. Burnap, defendants.

To Alfred C. Chapin, esq., attorney for the above-named defendants, No. 61 Broadway, New York City:

SIR: You will please take notice, that upon the process, pleadings,

and proceedings in the above-entitled action or cause, and also upon the annexed affidavit of Andrew G. Cropsey, the plaintiff's attorney, the above-named plaintiffs, through their attorney and counsel, will move the above-named circuit court of the United States for the
48 second circuit, eastern district of New York, at the court-room thereof, at the corner of Montague and Clinton streets, in the city of Brooklyn, on the twenty-first day of May, 1878, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard:

1. That the order made at a special term of the supreme court of the State of New York, at the City Hall in the city of New York, on the 4th day of May, 1878, present, Hon. Charles Donohue, justice, be declared, null, void, and of no effect, and that this action or cause be remitted to the supreme court of the State of New York for further proceedings therein according to law, the same as if the aforesaid order had never been made.

2. That if this court should be of the opinion that the cause is properly in this court so far as it relates to the defendants Samuel Keefer and Henry McKinnie, then this court decline to assume or to entertain jurisdiction as to the other defendants, and remit the cause to the State court as to them.

3. That such further and other relief as to the court may seen just and proper be granted the plaintiffs, with costs.

Dated May 14, 1878.

ANDREW G. CROPSEY,
Plaintiffs' Attorney, New Utrecht, Kings Co., N. Y.

JACOB A. GROSS,
Of Counsel, &c.

49 In the circuit court of the United States for the second circuit and eastern district of New York, on removal from the supreme court of the State of New York, Kings County.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT, plaintiffs,
against
AUSTIN CORBIN, GEO. S. C. DOW, THE NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY, SAMUEL KEEFER, HENRY MCKINNIE, AND UZZIAH C. BURNAP, defendants.

UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

Andrew G. Cropsey, being duly sworn, doth depose and say:

That he is the plaintiffs' attorney in this action, which was brought to recover possession of certain real property situate, lying, and being within the county of Kings and State of New York.

That the defendants, Austin Corbin, George S. C. Dow, and Uzziah C. Burnap, at the time of commencement of this action, as
50 near as deponent can ascertain, were and still are citizens of the State of New York and residents thereof; and the defendant The New York and Manhattan Beach Railway Company claims that at the time of commencement of this action it was and still is a corporation existing under the laws of the State of New York.

That the defendants, Samuel Keefer, Henry McKinnie, and Uzziah C. Burnap, are severally merely nominal parties, claiming possession and title under the first named defendants, or one of them, and, as de-

ponent is informed and verily believes, said defendants Keefer, McKinnie, and Burnap are copartners, doing business under the firm-name of Keefer & Company, and as such claim possession of a certain building upon Coney Island, in said county and State, under a lease thereof from the three first named defendants, and which building is styled the "Manhattan Beach Hotel," and plaintiffs' claim is partly located upon the real property in suit.

That the summons and complaint in the action were served on 24th January, 1878, and upon only two of the defendants, viz, The
51 New York and Manhattan Beach Railway Company and Uzziah C. Burnap; notwithstanding that fact, Mr. Alfred C. Chapin, an attorney of the supreme court of the State of New York, served upon deponent, on 12th February, 1878, a notice of retainer by and appearance for all of the defendants, and afterwards, on 20th March, 1878, served deponent with answers for all of the defendants.

That the action was duly noticed for trial and placed upon the calendar of the State court for the 1st Monday (6th) May, 1878. On Saturday, May 4th, 1878, deponent was served with a copy of an order of supreme court of State of New York purporting to have been made in another judicial district from that in which the action was brought and pending at the date of such order, to wit, at the City Hall in the city of New York, on the 4th day of May, 1878, which by its terms purports to remove the entire cause into this court.

That no application to remove this cause to this court was made at the time of appearance, nor was any notice given to deponent of any intended application to remove this cause to the circuit court of
52 the United States, and that the first notice which deponent had of any such motion was the service of the aforesaid copy order.

Deponent further says that he has carefully examined the acts of Congress providing for the removal of causes from the State courts to the circuit courts of the United States, and verily believes and insists that this is not a proper case for removal, and if a proper case at all, it could only be removed as to the defendants Samuel Keefer and Henry McKinnie, who claim to be citizens of other States.

That upon the receipt of the aforesaid order deponent applied to the Hon. Charles Donohue, the justice presiding at the supreme court, first department and district, at the time the same purports to have been made, to have the same vacated and annulled, but said justice refused to entertain deponent's motion, stating as the reasons for such refusal "that by virtue of the order already made the State court had been divested of jurisdiction, and application must be made to the circuit court of the United States.

ANDREW G. CROPSEY.

Sworn to before me this 14th day of May, 1878.

B. LINCOLN BENEDICT,
U. S. Comm'r.

53 (Indorsed:) U. S. circuit court, 2nd circuit, E. D., N. Y. Catharine Van Brunt et al. vs. Austin Corbin et al. Copy affidavit and notice of motion to vacate, &c. Andrew G. Cropsey, pl'ff' att'y, New Utrecht, N. Y. To Alfred C. Chapin, esq., def'ts' att'y, 61 B'way, N. Y. City.

54 In the circuit court of the United States for the second circuit and eastern district of New York, on removal from the supreme court of the State of New York, Kings County.

CATHARINE VAN BRUNT & AN'R, PLAINTIFFS,
against
AUSTIN CORBIN & OTHERS, DEFENDANTS.

UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

Andrew G. Cropsey, the plaintiffs' attorney here'n, being duly sworn, doth depose and say, in addition to his affidavit herein and verified 14th May, 1878—

That at the time of serving notice of appearance, Mr. Alfred C. Chapin, the defendants' attorney, served deponent with a copy of affidavit of merits of defendant Austin Corbin, and his own affidavit, with an order of Hon. Joseph F. Barnard, extending defendants' time to plead twenty days from February 13, 1878;

That on March 9th, 1878, said defendants' attorney again
55 served deponent with a copy of his affidavit and order of Hon. Calvin E. Pratt, extending defendants' time to plead twenty days from March 11, 1878;

That on March 12th, 1878, deponent presented his affidavit to the Hon. Calvin E. Pratt, stating the proceedings in the cause, and his hon. made an order reducing defendants' time to plead ten days from that date, a copy of which affidavit and order were duly served upon said defendants' attorney March 12, 1878, in person by this deponent;

That on twentieth March, 1878, deponent was served by said Alfred C. Chapin with the answers of the defendants;

That the first term or circuit of the supreme court of the State of New York in and for the county of Kings, after the joining of issue in this cause, and at which this cause could have been tried, was held on Monday, the first day of April, 1878, and continued in session until the 26th day of April, 1878;

That on the 17th day of April, 1878, deponent served a notice of trial for the term or circuit of the State court to be held on the first Monday (6th) May, 1878.

56 On the 19th day of April, 1878, deponent was served by defendants' attorney with a notice of trial on part of defendants for the same term or circuit of the State court to be held on 1st Monday of May, 1878, copies of which notices of trial are hereto annexed, marked "A" and "B," respectively.

That after the service of such notices of trial, and on the 20th day of April, 1878, deponent filed a note of issue for this cause with the clerk of the county of Kings, and paid the fees required by law; and thereupon this cause was placed upon the calendar of said State court. The calendar was completed by the 27th day of April, 1878, and this cause stands No. 553 thereon.

Deponent further says that no application to remove this cause from the State court to this court was made before or at said April term or circuit of the State court, nor was such application made until after the cause was upon the calendar of the next term of the State court.

Deponent further says that there has been no stay of proceed-
57 ings whatever, either by order or operation of law in this cause from the commencement thereof until defendants served deponent with the alleged order of removal.

ANDREW G. CROPSEY.

Sworn to before me this 3rd day of June, 1878.
[SEAL.]

R. P. MORLE,
Notary Public, Kings Co., N. Y.

58 *Notice of trial.*

New York supreme court, Kings County.

CATHARINE VAN BRUNT & AN'R, PL'FFS, *against* AUSTIN CORBIN & O'RS, DEF'TS. } "A."

Please to take notice that the issue of fact in this action will be brought to trial and an inquest taken therein at the next circuit court appointed to be held in and for the county of Kings, at the Kings County court-house, in the city of Brooklyn, on the first Monday of May, 1878, at ten o'clock in the forenoon of the same day.

Dated the 17th day of April, 1878.

ANDREW G. CROPSEY,
Attorney for Pl'ffs, New Utrecht, N. Y.

To ALFRED C. CHAPIN, Esq.,
Attorney for Def'ts, 61 Broadway, N. Y.

59 (Indorsed:) N. Y. supreme court. Catharine Van Brunt ag'st Austin Corbin. Notice of trial for May term, 1878. Andrew G. Cropsey, def'ts' att'y. Due and timely service of a notice of which the within is a copy, is hereby admitted. Dated New York, , 1877. , att'y. Served by Henry C. Rudin, April 17, 1878. Affidavit service annexed.

60 *Notice of trial.*

Supreme court, Kings County.

CATHARINE VAN BRUNT AND OTHERS, PLAINTIFF', *against* AUSTIN CORBIN AND OTHERS, DEFENDANT'. } "B."

Please to take notice that the issues in this action will be brought to trial and a motion made to dismiss the complaint therein at a circuit appointed to be held in and for the county of Kings, at the court-house in the city of Brooklyn, on the first Monday of May, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated the 18th day of April, 1878.

ALFRED C. CHAPIN,
Attorney for Def'ts.

To ANDREW G. CROPSEY, Esq.,
Attorney for Pl'ff.

61 (Indorsed:) Supreme court, Kings county. Catharine Van Brunt & o'r ag'st Austin Corbin & others. Notice of trial for Alfred C. Chapin, att'y for def't, 61 Broadway, N. Y. To Andrew G. Cropsey, esq., New Utrecht, L. I. Rec'd April 19th, 1878, A. G. C., pl'ffs' att'y.

62 (Indorsed:) U. S. circuit court, 2d circuit, E. D., N. Y. Catharine Van Brunt & o'r vs. Austin Corbin & o'rs. Further affidavit in support of pl'ffs' motion to vacate order of removal, &c. Andrew G. Cropsey, Pl'ffs' att'y, New Utrecht, N. Y.

The plaintiffs are hereby permitted to read the within affidavit upon

their motion to vacate order of removal on 6th June, 1878, provided a copy thereof is served upon defendants' attorney this day.

Dated June 3d, 1878.

(S'g'd) "C. L. B."

63 In the circuit court of the United States, 2d circuit and eastern district of New York.

CATHARINE VAN BRUNT AND ANOTHER, plaintiff,
ag'st
AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah Burnap, defendants.

CITY AND COUNTY OF NEW YORK, *ss:*

Alfred C. Chapin, being duly sworn, says that he is the attorney for the above-named defendants, and for each and all of them; that all of said defendants have appeared in this action, and that each one of said defendants has served a separate answer herein; that the answers of the said defendants were served on the 20th day of March, 1878; that this action is brought to recover the possession of certain real property alleged in the complaint to be located on Coney Island, in the county of Kings, and State of New York; that the relief demanded in the complaint is the possession of said property, together with money damages; that the said relief *is* demanded in this complaint is against all the defendants, without distinction or discrimination, alike; that said complaint contains an allegation that the defendants made un-
64 lawful entry upon said property, and that said allegation is made against all the defendants alike; that this deponent has read the papers signed by Andrew G. Cropsey, the plaintiffs' attorney herein, and entitled "further affidavit"; that the allegation in said further affidavit, in folio 4 thereof, to the effect that this cause could have been tried at the April term of the supreme court is incorrect and misleading; that the answer of the defendants were served, as aforesaid, upon March 20th, 1878, and that then, and not before, the case was at issue; that the April term of the supreme court began upon Monday, the 1st day of April, 1878; that according to the rules and practice of the supreme court of the State of New York, a notice of trial must be served fourteen days, at least, before the first day of the term for which said notice is given, and that notice of trial cannot be served, according to the rules and practice of said court, until the cause is at issue; that this cause, as above set forth, was not at issue in time for either party to serve notice of trial for the April term; that in said court a note of issue must be filed twelve days before the first day of the term for which the cause is noticed for trial; that a note of issue cannot be filed until after the case is at issue; that, as above set forth, this cause was not at issue twelve days before the 1st day of the April term; that, in fact, no notice of trial was served by either party for the
65 April term, and no note of issue for said term was filed by either party; that said cause was not upon the calender of the April term, and could not have been tried at said term; that no notice of trial was served by both parties for the May term of said court, and the case placed upon the calender of that term; that the said May term was the first term of said court at which this cause could have been tried;

that said term began upon Monday, the 6th day of May, 1878; that the petition, bond, and order removing this cause were filed and approved and served upon Saturday, the 4th day of May, 1878, that is to say, two days before the first day of said May term, which was the first term at which this cause could have been tried; that the claim of the plaintiffs herein is the same against all these defendants; that each of said defendants has joined issue with the plaintiffs, and that all of said defendants unite in the petition herein to remove this cause to this court.

ALFRED C. CHAPIN.

Sworn to before me this 5th day of June, 1878.

GEO S. C. DOW,
Notary Public, Kings Co., acting in N. Y. Co.

66 At a stated term of the circuit court of the United States of America for the second circuit, eastern district of New York, held at the United States court-rooms, in the city of Brooklyn, on Tuesday, the 18th day of June, in the year of our Lord one thousand eight hundred and seventy-eight:

Present, the honorable Charles L. Benedict, district judge.

CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT, plaintiffs,
ag'st
AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnie and Uzziah C. Burnap, defendants.

The plaintiffs' motion to remand this cause to the supreme court of the State of New York in and for the county of Kings, coming on to be heard, on reading and filing affidavit of Andrew G. Cropsey, the plaintiffs' attorney, verified 14th May, 1878, with notice of this motion thereto annexed, with admission of due service thereof on Alfred C.
67 Chapin, esq., the defendants' attorney; also additional affidavit of Andrew G. Cropsey, verified 3rd June, 1878, with admission of due service thereof upon defendants' attorney; and, on reading the proceedings herein and copy of the petition of defendants on their application for the removal of this cause from the State court (all contained in the record from the State court, filed in this court on the 23d May, 1878), and after hearing Abel Cook, esq., of counsel for the plaintiffs, in support of the motion, and Alfred C. Chapin, esq., of counsel for the defendants, opposed, and on reading and filing the affidavits of said Alfred C. Chapin, defendants' attorney:

It is, on motion of Andrew G. Cropsey, the plaintiffs' attorney herein, ordered that the said motion to remand this cause be, and the same is hereby, granted, and this cause is hereby, in all respects, remanded to the supreme court of the State of New York in and for the county of Kings.

CHAS. L. BENEDICT.

Filed 19th day of June, 1878.

68 EASTERN DISTRICT OF NEW YORK, *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the above is a true copy of an original order in the above-entitled action, on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred*th* and second.

[L. S.] B. LINCOLN BENEDICT, *Clerk.*

Enter. C. L. B.

69 (Indorsed:) United States circuit court for eastern dist. of N. Y. Catharine Van Brunt et al. vs. Austin Corbin et al. Order remanding cause to State court. Andrew G. Cropsey, pl'ff' att'y, New Utrecht, N. Y. Order. Filed 19th day of June, 1878. To Alfred C. Chapin, esq., def'ts' att'y, 61 Broadway, N. Y. City.

To Alfred C. Chapin, esq., defendants' attorney in within action:

You will please take notice that the within is a copy of an order duly entered in the within-entitled action in the office of the clerk of the circuit court of the United States of America for the second circuit, eastern district of New York, at the city of Brooklyn, on the 19th day of June, 1878.

Yours, &c.,

ANDREW G. CROPSEY,
Plaintiff's Attorney New Utrecht, N. Y.

Dated June 25, 1878.

70 BENEDICT, J.

This is a motion to remand this cause to the State court, whence it has been removed by filing a petition and bond, by virtue of the provisions of the statute of the United States, passed March 3, 1875. The suit is an action of ejectment. The plaintiff is a citizen of the State of New York; of the five defendants, three are citizens of the State of New York, one a citizen of the State of Ohio, and the other the State of Indiana. None of the parties are nominal parties; all the defendants joined in the petition for removal, and the whole suit is sought to be transferred to this court. The right to retain this cause in this court is sought to be upheld, upon the authority of a decision rendered by Mr. Justice Bradley in Girardy vs. Morre (5 Central Law Journal, p. 78), where it was determined by that eminent judge that under the act of March 3, 1875, the right of removing a cause from the State court to the circuit court of the United States exists in all cases where there are substantial parties, citizens of different States on opposite sides of the cause; although there are parties on opposite sides, who are citizens of the same State. I am prevented from adopting this view of the statute by a decision of the circuit judge of this circuit (Petersen vs. Chapman, 13 Blatchford, 396), where it was upheld that to authorize a re-

71 moval under the act of March 3, 1875, each individual plaintiff must be of different State citizenship from that of each individual defendant.

This decision now furnishes the law for this circuit, and in accordance with such authority it must be held in this case, that inasmuch as there is but one controversy to which all the parties in the suit are substantial parties, and where some of the defendants are citizens of the same State as the plaintiff, the suit is not one in which there is a controversy between citizens of different States within the meaning of the act of March 3, 1875. This conclusion renders it unnecessary to consider the other grounds of objection to the proceedings. The motion to remand is granted.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the eastern district of New York, greeting:

Because in the records and proceedings, as also in the making of the order which is in the said circuit court, before you, between Catharine Van Brunt and Abraham Van Brunt, and Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee, Uzziah C. Burnap, remanding the said cause to the supreme court of the State of New York, a manifest error hath happened, to the great damage of the said Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee, Uzziah C. Burnap, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the order, record, and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there
73 held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, the 2d Monday of October, in the year of our Lord one thousand eight hundred seventy-eight.

B. LINCOLN BENEDICT, *Clerk.*

74 (Indorsed:) Supreme Court of the United States. Austin Corbin and others, pl'ffs in error, ag'st Catharine Van Brunt and another, def'ts in error. Writ of error. Alfred C. Chapin, att'y for pl'ff in error, 61 B'way, N. Y. City.

75 Supreme Court of the United States.

Know all men by these presents, that we, Austin Corbin, of No. 54 First Place, in the city of Brooklyn, and James K. O. Sherwood, of the town of Oyster Bay, County of Queens, and State of New York, are held and firmly bound unto Catharine Van Brunt and Abraham Van Brunt, in the full and just sum of five hundred dollars, to be paid to the said Catharine Van Brunt and Abraham Van Brunt, their certain attorney, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the 16th day of October, one thousand eight hundred and seventy-eight.

Whereas lately, at a circuit court of the United States, held in and for the eastern district of New York, in a suit between Catharine Van Brunt and Abraham Van Brunt, plaintiffs, and Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee, and Uzziah C. Burnap, defendants, an order was made remanding the said cause to the supreme court of the State of New York; and the said Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer,

Henry McKinnee, Uzziah C. Burnap, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the said order in the aforesaid suit, and a citation
76 directed to the said Catharine Van Brunt and Abraham Van Brunt, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2d Monday of October next:

Now, therefore, the condition of this obligation is such that if the above-named Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee, Uzziah C. Burnap, shall prosecute their said writ of error to effect and answer all costs if they should fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

A. CORBIN. [SEAL.]
J. K. O. SHERWOOD. [SEAL.]

Sealed and delivered in the presence of—

UNITED STATES OF AMERICA,
State, City, and County of New York,
Southern District of New York, ss:

Austin Corbin being duly sworn, says that he is a resident of and freeholder within the city of Brooklyn, in the eastern district of New York, and is worth the sum of one thousand dollars over and above all his just debts and property exempt by law from execution.

A. CORBIN.

Sworn to before me this day of October, 1878.

M. J. CONNELLY,
Notary Public Kings Co., acting in N. Y. Co.

77 UNITED STATES OF AMERICA,
State, City, and County of New York,
Southern District of New York, ss:

James K. O. Sherwood being duly sworn, says that he is a resident of and freeholder within the town of Oyster Bay, county of Queens, in the eastern district of New York, and is worth the sum one thousand dollars over and above all his just debts and property exempt by law from execution.

J. K. O. SHERWOOD.

Sworn to before me this day of October, 1878.

M. J. CONNELLY,
Notary Public Kings Co., acting in N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York,
State, City, and County of New York, ss:

On the 17th day of October, one thousand eight hundred and seventy-eight, before me, personally came and appeared Austin Corbin and J. K. O. Sherwood, within named, known to me to be the same individuals described in and who executed the foregoing bond and severally acknowledged that they executed the same.

M. J. CONNELLY,
Notary Public Kings Co., acting in N. Y. Co.

78 (Indorsed:) Supreme Court of the United States. Austin Corbin and others, pl'ffs in error, ag'st Catharine Van Brunt & another. Bond for costs, &c. Copy. Alfred C. Chapin, att'y for pl'ffs in error, 61 B'way, N. Y. City.

79 UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to ninety-three inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Catharine Van Brunt and Abraham Van Brunt, plaintiffs, against Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee, and Uzziah C. Burnap, defendants.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 3rd day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the said United States the one hundred and fourth.

B. LINCOLN BENEDICT, *Clerk.*

80 UNITED STATES OF AMERICA, *ss:*

To Catherine Van Brunt and Abraham Van Brunt.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the eastern district of New York, wherein Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah C. Burnap are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the order in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-eight.

CHAS. L. BENEDICT,
District Judge.

81 SOUTHERN DISTRICT OF NEW YORK, *ss:*
City and County of New York, ss:

Alfred E. Foster, being duly sworn, says that he is 19 years of age, that on the 22d day of October, 1878, he served the within citation on Andrew G. Cropsey, esq., attorney for the defendants in error herein, at corner of 5th avenue and 27th street, in the city of Brooklyn, personally, by delivering to and leaving with said attorney a copy of said citation, and at the same time and place exhibiting to the said attorney the within original citation, with the judges signature thereto appended.

ALFRED E. FOSTER.

Sworn to before me this 22d day of October, 1878.

M. J. CONNELY,
Notary Public, Kings Co., acting in N. Y. Co.

(Indorsed:) Supreme Court of the United States. Austin Corbin and others pl'ffs in error, v. Catharine Van Brunt and another, defendants in error. Orig'l citation. Alfred C. Chapin, attorney for pl'ffs in error, 61 Broadway, N. Y.

OCT. 18*th*, 1878.

Due service of the within citation is this day admitted.

82 Supreme Court of the United States.

AUSTIN CORBIN, GEORGE S. C. DOW, THE New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah C. Burnap, plaintiffs in error,
ag'st
CATHERINE VAN BRUNT AND ABRAHAM VAN Brunt, defendants in error.

At October term in the year of our Lord one thousand eight hundred and seventy-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah C. Burnap, by Alfred C. Chapin, their attorney, and say that in the record and proceedings aforesaid, there is manifest error in this, to wit, in remanding the said cause, wherein the said Catherine Van Brunt and Abraham Van Brunt are plaintiffs, and said Austin Corbin, George S. C.
83 Dow, The New York Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah C. Burnap, are defendants to the supreme court of the State of New York, and in holding and deciding that the same was not properly removed or removable to the circuit court of the United States for the eastern district of New York, and in holding and deciding that it had not acquired jurisdiction of the same.

And the said Austin Corbin, George S. C. Dow, The New York and Manhattan Beach Railway Company, Samuel Keefer, Henry McKinnee and Uzziah C. Burnap, pray that the order aforesaid may be reversed, annulled, set aside, vacated, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said order.

ALFRED C. CHAPIN,
Attorney for Plaintiffs in Error, No. 115 Broadway, New York.

(Indorsed:) Supreme Court of the United States. Austin Corbin and others, pl'ffs in error, ag't Catherine Van Brunt and another, defendants in error. Org'l assignment of error, Alfred C. Chapin, att'y for pl'ffs in error, No. 115 Broadway, N. Y.

(Indorsement on cover:) No. 302. Austin Corbin, George S. C. Dow, The New York & Manhattan Beach Railway Company, et al., plaintiffs in error, vs. Catharine Van Brunt and Abraham Van Brunt. E. New York, C. C. U. S. Filed 7th October, 1879.

REC. 268—3

CHARLES S. HAMILTON & Co., Printers, 61 Cedar St., N. Y.

SUPREME COURT U.S.
FILED
APR 21 1882
JAMES H. MCKENNEY

Supreme Court,

OF THE UNITED STATES.

AUSTIN CORBIN, *et al.*,
Plaintiffs in Error,
vs.
CATHERINE VAN BRUNT, *et al.*,
Defendants in Error.

No. 302.

STATEMENT.

This action, originally brought in the Supreme Court of the State of New York, by the defendants in error against the plaintiffs in error, was for ejectment and mesne profits, the latter alone exceeding $500 (*p.* 2). The defendants in error (plaintiffs in the Court below) were citizens of New York State. Of the plaintiffs in error (defendants in the Court below) one was a citizen of the State of Ohio and another a citizen of the State of Indiana (*p.* 12).

The action was commenced January 24th, 1878. Issue was joined by defendants answering on March 20th, 1878. The term of the State Court at which the cause could have been first tried, began May 6th, 1878 (*p.* 20).

All the plaintiffs in error united in a petition for the removal of the cause into the Circuit Court of the United States for the Eastern District of New York in due form, and the cause was so removed by order of the State Court, on May 4th, 1878 (*p.* 14).

Defendants in error moved the Circuit Court on the record and affidavits, to remand the cause to the State Court (*p.* 14), which motion was granted, upon the ground that to authorize a removal, each individual plaintiff must be of different State citizenship from that of each individual defendant (*p.* 21). The writ of error is brought to review that order of the Circuit Court.

ERROR.

That the motion to remand should have been ~~granted~~ denied, the cause being removable and having been properly removed.

BRIEF.

Submitted on behalf of the plaintiffs in error.

This case presents simply the question whether, under the statute of 1875, a cause can be removed from a State court to a ~~national~~ court, where some of the parties on opposite sides of the controversy in the Court below are citizens of different States, or whether, to allow removal, a case must exist in which no one of those on one side shall be of the same State as any one of those on the other.

The Court below rests its decision upon the case of Peterson *vs.* Chapman, 13 Blatch., 396, following

that case, as authoritative in that circuit, against the decision to the opposite effect in Gerardey *vs.* Moore, 5 Cent. Law Journal, 78. This cause then presents the question as to which of those decisions shall be upheld.

I.

The language of the Constitution, granting jurisdiction to the Federal Courts, and of the act of 1875, regulating the removal of causes, are coextensive, extending to all cases in which there shall be "a controversy between citizens of different States." This is broad and general language, and therefore it must extend to every case in which such a controversy exists.

Such a controversy does exist in the present case for there is a complaint by citizens of New York, and an answer to that complaint by a citizen of Ohio, and another separate answer to such complaint by a citizen of Indiana. Each one of such issues is a controversy in this action, for it has been held in this Court (Mayor *vs.* Del. R. R. Construction Co. decided in October, 1879) that the word "controversy" does not necessarily mean the whole suit, including all the parties, but that it may even mean a controversy arising between two defendants, as in a case of interpleader. The Act of 1875, Sec. 2 also recognizes the distinction between the word "suit" and the word "controversy."

Is it not reasonable to suppose that if authority was meant to be given to remove only those cases in which all the parties on opposite sides were of different State citizenship, such limitation would have been expressly made in the language? But the terms are very broad, including every "controversy between citizens of different States," and if such a case as the present cannot be

removed, then there are "controversies between citizens of different States," which cannot be removed.

In the second clause of Sec. 2 the Statute does use the phrase, "wholly between." If that was the intention in the first clause, would it not have been used there also?

The argument of the Court in Petersen *vs.* Chapman (*cited above*) is, that "when jurisdiction of the Federal Court depends alone on citizenship, the fact that it exists as to one person does not afford a foundation for asserting it over another."

It is submitted, that while this argument would be weighty in the absence of the expression of an unmistakable intention to give such jurisdiction, yet it cannot apply when the Statute expressly gives the power to remove a case in which the controversy between citizens of different States exists, though there may be other controversies in the same case.

II.

There can be no doubt that it is the whole suit that is to be removed, if any, especially in such a case as the present where all the parties on one side unite in the petition. Any other course would be impracticable, and the Statute says "may remove said suit."

III.

Mr. Justice Bradley in the case above cited (*Gerardy* vs. *Moore*) has ably discussed this question and decided in accordance with these views.

He holds that Congress has attempted by this act to confer the full jurisdiction authorized by the Constitution, and that the right of removal "exists

in all cases where there are substantial parties, citizens of different States, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same State." And he considers that under the act of 1875 the whole cause is removed.

This view is confirmed by the fifth section, which provides for the case of parties being improperly or collusively made or joined for the purpose of creating a case cognizable or removable to the Circuit Court. If by joining a non-resident a case can be made cognizable by the Federal Court, then the Federal Court has jurisdiction of a case between a citizen on one side, and a citizen of the same State and a citizen of another State on the other side.

In Osgood *vs.* Chicago, etc., 14 Am. Law Reg. (N. S.), 506, the same construction is placed upon the act by Drummond, J., and Blodgett, J.

See also *N. J. Zinc Co.* vs. *Totten*, 17 *Am. Law Reg.* (*N. S.*), 376.

Sands vs. *Smith*, 1 *Dillon*, 290.

Johnson vs. *Monell*, 1 *Wool.*, 390.

IV.

As to the cases seeming to hold the contrary doctrine, it is to be noticed that they arose under the law existing before 1875, before Congress had attempted in the act of 1875 to bestow all the jurisdiction authorized by the Constitution.

V.

If a suit is not removable by one defendant because a co-defendant happens to be of the same State, a plaintiff by collusively joining a party may defeat the act and the Constitution.

VI.

In the present case the removal was made in time. It was made May 4th. The first term at which trial could be had began May 6th. Issue was joined March 20th. Though there was a term beginning April 1st, the trial could not have been had thereat, for there was not sufficient time between March 20th and April 1st in which to serve a notice of trial. The statute of the State governing this reads as follows (*Code of Procedure, sec.* 256):

"At any time after issue, and at least *fourteen* days before the Court, either party may give notice of trial. The party giving the notice shall furnish the Clerk, at least *twelve* days before the Court, with a note of issue, containing, etc."

In this case the cause was not noticed for trial at the April term by either side and was not upon the calendar (*p.* 19).

VII.

The order of the Circuit Court remanding the cause should be reversed.

WINCHESTER BRITTON,
of Counsel for plaintiffs in error,
Brooklyn, N. Y.

Randall Hagner
of Counsel for plaintiffs in error.

OFFICE SUPREME COURT
FILED
APR 25 1882
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States.

AUSTIN CORBIN, GEORGE S. C. DOW, THE NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY, SAMUEL KEEFER, HENRY MCKINNIE, AND UZZIAH C. BURNAP, *Plaintiffs in Error*, *against* CATHARINE VAN BRUNT AND ABRAHAM VAN BRUNT, *Defendants in Error.*	No. 302.

Brief for Defendants in Error.

STATEMENT.

This cause is an action of ejectment, and was commenced in the Supreme Court of the State of New York.—(Printed Record, pp. 1, 2.) The land sought to be recovered is situated at Coney Island, in the town of Gravesend, County of Kings, and State of New York.—(pp. 15, 19.) The cause was removed into the Circuit Court of the United States for the Second Circuit, Eastern District of New York, on 4th May, 1878 (p. 14), and remanded to the state court on 18th June, 1878.—(pp. 20, 21.) The plaintiffs in the action (Van Brunts) are citizens of the State of New York, and reside in such county of Kings and State of New York.—(p. 12.) One of the defendants, Samuel Keefer, is a citizen of the State of Ohio;

another of the defendants, Henry McKinnie, is a citizen of the State of Indiana.—(p. 12.) All of the other defendants, four in number, are citizens of the State of New York.—(p. 15.) Of these defendants, the one against whom the action is chiefly brought is The New York and Manhattan Beach Railway Company, a corporation existing under the laws of the State of New York.—(pp. 6, 7, 9, 11.)

The defendants in the action unite in claiming the right to occupy the lands because of the alleged title thereto of such railway company.—(pp. 3, 4, 5, 6, 7, 9, 11.)

The sole issue as to the title of the land in fee, is between the plaintiffs and such railway company, and the action is to determine whether the plaintiffs or such company own such fee. The other defendants make no pretence of claim except through such railway company.—(pp. 3, 4, 5, 6, 7, 9, 10, 11, 15, 16.)

Arranging the parties thus on opposite sides of the subject-matter in dispute, it does not appear that those on one side are all citizens of different states from those on the other.—(21.)

This court, in like cases, has construed the law of 1875 (act March 3d, chapter 137) not to warrant a removal from the state court.

Removal Cases, 100 U. S., 457, (p. 468, &c.)
Barney vs. Latham, 103 U. S., 205.

The decision in the case at bar is reported in 14 Blatchford C. C. R., 496.

See, also, decision of Mr. Justice Swayne, United States Circuit Court, *In re* Frazer, reported in 18 Albany (N.Y.) Law Journal, 353, August, 1878.

The order of the circuit court remanding the cause to the state court should be affirmed.

J. J. McELHONE,
JOS. K. McCAMMON,
Attorneys and of Counsel for Defendants in Error.

Petition and Transcript of Record.

SUPREME COURT OF THE UNITED STATES.

No. 10 orig

SAMUEL FLOYD HOARD AND THE CEREDO CEMETERY ASSOCIATION

vs.

HONORABLE JOHN J. JACKSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

PETITION FOR RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT ISSUE.

FILED NOVEMBER 7 1881.

SUPREME COURT OF THE UNITED STATES.

No.

SAMUEL FLOYD HOARD AND THE CEREDO CEMETERY ASSOCIATION

vs.

HONORABLE JOHN J. JACKSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

PETITION FOR RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT ISSUE.

INDEX.

	Original.	Print.
Order docketing in U. S. Court	1	2
" " County Court	2	3
Order appointing commissioners	14	8
" tendering plea in abatement	26	13
Bond for removal	24	12
Petition and application	3	3
" for removal	22	11
Report of commissioners	17	9
Notice of application	7, 9, 11	5, 6
" return of service of	9, 11, 13	6, 7, 8
Summons of commissioners	16	9
" return of	16	9
Receipt for money paid	21	11
Exceptions to commissioners' report	30	14
Answer of D. H. Baldwin	27	13
" " " order filing	26	13
Bill of exceptions	33	16
Plea in abatement, rejected	32, 33, 35	15, 17
" " tendered	26, 32	13, 15
Motion to remand	27	13
" refused	31	15
" renewed	32	15
Motion to remand to Circuit Court	32	15

Supreme Court of the United States.

SAMUEL FLOYD HOARD AND THE CEREDO Cemetery Association
vs.
HONORABLE JOHN J. JACKSON, JUDGE OF the District Court of the United States for the District of West Virginia.

To the Honorable the Chief Justice and Judges of the Supreme Court of the United States of America.

Your petitioners represent that they are the same Samuel Floyd Hoard and the same The Ceredo Cemetery Association named in the record of the cause of the Chesapeake and Ohio Railway Company, applicant and plaintiff, vs. C. B. Hoard, D. H. Baldwin, Samuel Floyd Hoard, and the Ceredo Cemetery Association, defendants, accompanying this petition, which said cause was instituted in the County Court of Wayne County, West Virginia, but which, as appears from the record aforesaid, is now pending in the District Court of the United States for the District of West Virginia, at Charleston.

As shown by the petition of the Chesapeake and Ohio Railway Company, the said corporation is duly incorporated under the laws of Virginia and West Virginia, and, your petitioners allege, must be regarded as a citizen of said State of West Virginia, as are also these petitioners.

The record further shows that these petitioners made a motion in said district court asking that said cause be stricken from the docket of said court and remanded to the County Court of Wayne County, West Virginia, whence it came, as to these petitioners, for want of jurisdiction in said district court. That said motion being considered by the Honorable John J. Jackson, presiding judge of said court, the same was denied and overruled and the said court declared its right and intention to take jurisdiction over said cause and retain and try the same in said district court, and has assumed jurisdiction over the same.

Your petitioners are advised, and therefore aver, that the said Chesapeake and Ohio Railway Company is, in contemplation of law, a citizen of the State of West Virginia, and that as the petitioners are likewise citizens of said State of West Virginia, the said district court has no jurisdiction to entertain or to go on with and try the said cause, so far as these petitioners are concerned.

Your petitioners insist on their right to have the trial of their cause finished by the state court in which the same originated. And they allege that they would be aggrieved if the assumption of the said district court to go on with and complete the trial thereof or otherwise proceed therein were allowed.

And insisting on their legal rights in the premises, your petitioners pray this honorable court that a rule may issue from this honorable court to the Honorable John J. Jackson, judge of said district court, directing him to show cause, if any he have, why a mandamus should not issue commanding him to strike said cause from the docket of his said court, so far as these petitioners are concerned, and remand the same to the state court from whence it came, and upon the coming in of his answer that a peremptory mandamus be issued, and for such further and general relief in the premises as the justice of their case shall require and by the rules of the court they are entitled to. And as in duty bound your petitioners will ever pray, etc.

S. FLOYD HOWARD.
CEREDO CEMETERY ASSOCIATION,
By J. HOLDSWORTH GORDON, *Counsel.*

We do say, on oath, that the matters and things set forth in the foregoing petition are true, to the best of our knowledge and belief.

S. FLOYD HOARD.
Z. D. RAMSDELL,
President of the Ceredo Cemetery Association.

Subscribed and sworn before me, this 26th day of October, A. D. 1881.

MILTON SHELDEN,
Notary Public in and for Wayne Co., West Va.

STATE OF WEST VIRGINIA, }
WAYNE COUNTY, CLERK'S OFFICE. } *ss.*

I, P. H. Napier, clerk of the county court within and for the county and state aforesaid, do hereby certify that Milton Shelden is, and was at the time of signing the foregoing, a notary public appointed and duly qualified, and that his signature to the foregoing is genuine, as appears of record in my office.

Given under my hand seal of office, this October 27th, 1881.

[SEAL.] P. H. NAPIER,
Clerk Wayne Co. Court.

1 Pleas before the Honorable John J. Jackson, judge of the District Court of the United States for the District of West Virginia, at Charleston, on the 26th day of May, 1881, and in the 105th year of the independence of the United States of America.

Be it remembered that heretofore, to wit, at a district court of the United States for the district aforesaid, held at Charleston on the 18th day of May, 1880.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Applicant and Plaintiff,
vs.
C. B. HOARD, D. H. BALDWIN, SAMUEL FLOYD HOARD, and the Ceredo Cemetery Association, Defendants.
} On motion to take private property for public use.

This day came the plaintiff, by its attorney, and presented a complete transcript of the record of the above-entitled proceeding, by which it appears that the same was removed to this
2 court from the County Court of Wayne County, West Virginia, and, on motion, the said record is ordered to be filed, and this proceeding is docketed in this court, to be proceeded with according to the act of Congress in such cases made and provided.

Which transcript of record mentioned in the foregoing order is in the words and figures following, to wit:

"At a county court began and held at the court-house of Wayne County on the 6th day of October, 1879.

THE CHESAPEAKE AND OHIO RAILWAY Company
against
C. B. HOARD, SAMUEL FLOYD HOARD, D. H. Baldwin, and the Ceredo Cemetery Association.
} On motion to take private property for public use.

This day came the Chesapeake and Ohio Railway Company, by counsel, and presented an application, accompanied by the plats therein referred to, praying for the appointment of commissioners to view the strips of land in said application described, and
3 ascertain a just compensation therefor, and that such other orders may be entered and proceedings had as may be needful to vest in said company a full, complete, and legal title to each of said strips of land; and it appearing that due and legal notice of this proceeding, returnable on this day, was given by personal service of notice, more than ten days prior to this day, to C. B. Hoard, Samuel Floyd Hoard, D. H. Baldwin, and the Ceredo Cemetery Association, it is ordered that this application aforesaid be filed and this proceeding docketed.

"On the same day, October 6, 1879, there was a petition filed, which is as follows:

Petition.

To the Worshipful President and Justices of the County Court of Wayne County, West Virginia.

The petition of the Chesapeake and Ohio Railway Company respectfully shows that it is a corporation duly chartered and organized

under and by virtue of the laws of Virginia and West Virginia, for the purpose, among other things, of constructing, operating, and using a double-track railway and branches in said states; that
4 in accordance with its charter, it heretofore, to wit, in the month of May, 1879, caused to be surveyed and located a part of its line of railway through the county of Wayne, in the State of West Virginia, and on the lands in said county which will be hereafter fully described; that, for the purpose of constructing, operating, and using its said railway, it will require the lands so described; and that it is unable to agree with the owners and claimants thereof upon the compensation to be paid therefor; and that it is accordingly compelled to resort to the method prescribed by law for ascertaining such compensation, and acquiring title to said lands. The land required by your petitioner for the purpose aforesaid, and to be appropriated to the construction, operation, and use of its said railway, is more particularly described as follows:

First. A strip of land owned by C. B. Hoard, beginning on the center line of said railway, at station 2,209+70, where said line crosses the boundary between lands of C. B. Hoard and Z. D. Ramsdell in center of Twelve-Pole river, with a bearing S.
5 26° W.; thence with said center line, and a width of 100 feet on each side thereof, to station 2,211+40; thence continuing with said center line, and a width of 33 feet on each side thereof, to station 2,227+15; thence continuing with said center line, and with a width of 50 feet on each side thereof, to station 2,232; thence continuing with said center line, and a width of 33 feet on each side, to where said center line crosses the boundary between the lands of C. B. Hoard and James Ferguson, with a bearing N. 1° 30′ E., at station 2,236+35; which strip contains four and fifty-one one-hundredths acres.

Second. A strip of land owned by C. B. Hoard, beginning on the center line of said railway, at station 2.153, where said line crosses the boundary between the lands of C. B. Hoard and S. S. Vinson, with a bearing N. 82° E.; thence with said center line, and a width of 33 feet on each side thereof, to station 2,183+30, where said center line crosses the boundary between the lands of C. B. Hoard and Z. D. Ramsdell, with a bearing N. 11° 45″ W.; which strip contains four and fifty-five one-hundredths
6 acres; adjoining the above-described strip, and on the north side thereof, a strip 30 feet wide will be required for a site for a county road, which will have to be changed.

In the above-described strips your petitioner is informed that Samuel Floyd Hoard and the Ceredo Cemetery Association claim some interest, but the nature of such interest is unknown to your petitioner.

In the same strips your petitioner is informed that one D. H. Baldwin claims a lien by mortgage, but the amount due thereon is to your petitioner unknown.

Plats showing each of the above-described strips of land are herewith filed, marked respectively "A" and "B."

To the end, therefore, that your petitioner may acquire title to the several strips aforesaid, and that it may be permitted to enter upon, use, and enjoy the same, it has caused notice of this application to be given to the parties respectively interested therein; and it therefore prays that your honorable court will cause commissioners to be appointed pursuant to the statute in such
7 cases, to view the said strips of land, and ascertain a just compensation therefor to the parties respectively entitled thereto; and that such other orders may be entered and proceedings had as may be needful to vest in your petitioner a full, complete, and legal title to each of said strips of land. And as in duty bound, your petitioner will ever pray, &c.

THE CHESAPEAKE & OHIO RAILWAY CO.,

WM. H. HOGEMAN, *Atty.* *By Counsel.*

Afterwards, on the 16th day of August, 1879, there was a notice issued, which, with the return, is as follows:

Notice.

To C. B. Hoard, Samuel Floyd Hoard, D. H. Baldwin, The Ceredo Cemetery Association.

Take notice that, on the first Monday of October, 1879, an application will be made to the County Court of Wayne County, West Virginia, at a term thereof to be held at the court-house of said county on that day, for the appointment of commissioners to ascertain a just compensation to the owners for the sev-
8 eral parcels of land lying in Wayne County, West Virginia, on the line of the Chesapeake and Ohio railway, as surveyed in May, 1879, in which you are interested. The said parcels of land are laid down on a plat showing said line between Huntington and the Big Sandy River, which will be filed in the office of the clerk of the County Court of Wayne County, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular description of the several parcels of land proposed to be taken in the said tracts you are represented to be interested as owners, claimants, or lienholders. You are further notified that, at such time and during the pendency of these proceedings, application will also be made for such other orders and proceedings as may be necessary to condemn the said parcels of land, and each of them, for the purposes hereinafter named.

The said parcels of land, and each of them, are proposed to be taken by the Chesapeake and Ohio Railway Company, a corporation acting under the laws of Virginia and West Virginia,
9 and intended by the said company to be used and appropriated for the purpose of constructing and using a double-

track railroad, under and by virtue of its charter, from the city of Huntington, in Cabell County, to the Big Sandy River, in Wayne County, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

Dated August 16, 1879.

Return.

West Virginia, Wayne County, to wit:

D. W. Emmons, being duly sworn, says that, on the 16th day of August, 1879, he delivered copies of the within notice to C. B. Hoard and Samuel Floyd Hoard. D. W. EMMONS.

Subscribed and sworn to before me, this 16th day of August, 1879. CHAPMAN ADKINS,
Notary Public, Wayne Co., W. Va.

On the same date there was another notice issued, which, together with the return, is in the words and figures following:

Notice.

To C. B. Hoard, Samuel Floyd Hoard, and D. H. Baldwin, The Ceredo Cemetery Association.

Take notice that, on the first Monday of October, 1879, an application will be made to the County Court of Wayne
10 County, West Virginia, at a term thereof to be held at the court-house of said county on that day, for the appointment of commissioners to ascertain a just compensation to the owners for the several parcels of land lying in Wayne County, West Virginia, on the line of the Chesapeake and Ohio railway, as surveyed in May, 1879, in which you are interested. The said parcels of land are laid down on a plat showing said line between Huntington and the Big Sandy River, which will be filed in the office of the clerk of the County Court of Wayne County, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular description of the several parcels of land proposed to be taken. In the said tracts you are represented to be interested as owners, claimants, or lienholders. You are further notified that, at such time and during the pendency of these proceedings, application will also be made for such other orders and proceedings as may be necessary to condemn the said parcels of land, and each of them, for the
11 purposes hereinafter named. The said parcels of land and each of them are proposed to be taken by the Chesapeake and Ohio Railway Company, a corporation acting under the laws of Virginia and West Virginia, and intended by the said company to be used and appropriated for the purpose of constructing

and using a double-track railroad, under and virtue of its charter from the city of Huntington, in Cabell County, to the Big Sandy River, in Wayne County, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY
Dated August 16, 1879. COMPANY.

Return thereon.

August 18, 1879. I accept service of the within notice.

Z. D. RAMSDELL,
President of the Ceredo Cemetery Association.

And on the 5th day of July, 1879, there was another notice issued, which is as follows:

Notice.

To C. B. Hoard, Samuel Floyd Hoard, The Ceredo Cemetery Association, and D. H. Baldwin.

Take notice that, on the first Monday of October, 1879, an application will be made to the County Court of Wayne County,
12 West Virginia, at a term thereof to be held at the courthouse of said county on that day, for the appointment of commissioners to ascertain a just compensation to the owners for the several parcels of land lying in Wayne County, West Virginia, on the line of the Chesapeake and Ohio railway, as surveyed in May, 1879, in which you are interested. The said parcels of land are laid down in a plat of said line, which will be filed in the office of the clerk of the County Court of Wayne County, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular description of the several parcels of land proposed to be taken. In the said tracts you are represented to be interested as owners, claimants, or lienholders. You are further notified that, at such time and during the pendency of these proceedings, application will also be made for such other orders and proceedings as may be necessary to condemn the said parcels of land, and each of them, for the
13 purposes hereinafter named.

The said parcels of land and each of them are proposed to be taken by the Chesapeake and Ohio Railway Company, a corporation acting under the laws of Virginia and West Virginia, and intended by said company to be used and appropriated for the purpose of constructing and using a double-track railroad, under and by virtue of its charter, from the city of Huntington, in Cabell County, to the Big Sandy River, in Wayne County, West Virginia.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, *by Counsel.*
Dated July 5th, 1879. WM. H. HOGEMAN, *Counsel.*

Return.

STATE OF NEW YORK, } ss.
CITY AND COUNTY OF NEW YORK. }

James B. Hawes being duly sworn, deposes and says that, on the 22d day of August, 1879, at No. 34 Pine street, in the city of New York, he then being over 21 years of age, he served the within notice on D. H. Baldwin personally, by delivering a copy thereof to him personally, and leaving the same with him, and that he knew the person so served to be the person men-
14 tioned and described in said notice.

JAS. B. HAWES.

Sworn to before me, this 22d day of August, 1879.
[SEAL.] WM. C. McKEAN,
Notary Public, New York City and Co.

Afterwards, at a county court continued and held for Wayne County, at the court-house thereof, on the 7th day of April, 1880, there was an order made in this cause, which, with the summons and returns, is as follows:

Order appointing Commissioners.

THE CHESAPEAKE AND OHIO RAILWAY Company *against* C. B. HOARD, S. FLOYD HOARD, THE Ceredo Cemetery Association, and D. H. Baldwin. } On motion to take private property for public use.

This day came the parties to the above-entitled proceedings by their attorney, that is to say, the applicant by M. J. Ferguson and W. H. Hogeman, its attorneys, and the defendants by Eustace Gibson, their attorney, and by consent it is adjudged and ordered that L. T. Smith, Lamech Atkins, Lafayette Vinson, Alderson Workman, James P. Keyser, be, and they are hereby, ap-
15 pointed to go upon the tracts of land described in the written application heretofore filed herein, and after viewing the same, ascertain a just and equitable compensation therefor, according to the statute in such case made and provided, and that they report their proceedings by the next term of this court. The defendants reserve the right to file any answer or paper, or to make any defence or resistance to the proceedings upon the coming in of the commissioners' report at the next term of this court, that they might have made at this term to the appointment of said commissioners, or that they might make at the next term in resistance to the confirmation of any report that said commissioners may make, as fully and completely as if this order had never been entered, and any and all questions which shall be

raised by the defendants at the next term, as aforesaid, if any shall be fully adjudicated by this court, before the report of said viewers or commissioners shall be confirmed by this court.

W. H. HOGEMAN,
16 M. F. FERGUSON,
Att'ys for Applicant.
EUSTACE GIBSON,
Att'y for Defendant.

Summons.

To L. T. Smith, Lamech Adkins, Lafayette Vinson, Alderson Workman, and James P. Keyser.

You and each of you are hereby summoned in the name of the State of West Virginia, to meet on April 28, 1880, at 10 o'clock A. M., at the toll-bridge across Twelve-Pole River, in Ceredo, Wayne County, West Virginia, to execute the foregoing order, entered by the County Court of Wayne County on April 7th, 1880.

Given under my hand, this 7th day of April, 1880.

H. F. BOWEN, *S. W. C.*

Return.

Executed on Lamech Adkins, L. F. Vinson, and A. Workman, by delivering to each of them a true copy of the within order and summons, April 7, 1880.

H. F. BOWEN, *S. W. C.*

Executed on J. P. Keyser, by delivering to him a true copy of the within order and summons, April 12, 1880.

H. F. BOWEN, *S. W. C.*

17 Executed on L. T. Smith, by delivering to him an office copy of the within order or summons, April 15th, 1880.

J. P. BROMLEY, *Deputy for*
H. F. BOWEN, *S. W. C.*

Report.

To the Worshipful President and Justices of the County Court of Wayne County, West Virginia.

We, the undersigned, viewers appointed by an order of the County Court of Wayne County, West Virginia, entered on the 7th day of April, 1880, in the proceeding therein pending, in which the Chesapeake and Ohio Railway Company is applicant and C. B. Hoard, S. Floyd Hoard, D. H. Baldwin, and the Ceredo Cemetery Association are defendants, to view certain tracts of land in said proceeding described, and ascertain a just and equitable compensation therefor according to the statutes in such case made and provided, respectfully report that, after being first duly sworn, as appears by the oath taken and subscribed by us and

herewith returned, we met at the toll-bridge across Twelve-Pole River, in Ceredo, Wayne County, West Virginia, on the 28th
18 day of April, 1880, that being the time and place appointed by the sheriff of Wayne County, West Virginia, and of which due notice was given to the parties, as appears by the summons and notice and the returns thereon herewith filed, and viewed the tracts of land hereinafter described, that is to say: First. A strip of land owned by C. B. Hoard, beginning on the center line of the extension of the Chesapeake and Ohio railway in Wayne County, West Virginia, as surveyed in May, 1879, at station 2,153, where said line crosses the boundary between the lands of C. B. Hoard and S. S. Vinson, with a bearing N. 82° E., thence with said center line and a width of 33 feet on each side thereof to station 2,183+30, where said center line crosses the boundary between the lands of C. B. Hoard and Z. D. Ramsdell, with a bearing N. 11° 45′ W., which strip contains 4.55 acres, and adjoining the above-described strip and on the north side thereof a strip thirty feet wide, required and intended to be used for a county road, which will be changed through the land of C. B. Hoard, which contains 2.08 acres. Second. A strip of land owned
19 by C. B. Hoard, beginning on the center line of said railway at station 2,209+70, where said line crosses the boundary between the lands of Z. D. Ramsdell and C. B. Hoard in the center of Twelve-Pole River, with a bearing S. 26 W., thence with said center line with a width of 100 feet on each side thereof to station 2,211+40, thence continuing with said center line and a width of 33 feet on each side thereof to station 2,227+05, thence continuing with said center line and a width of fifty feet on each side thereof to station 2,232+05, and thence still continuing with said center line and with a width of 33 feet on each side thereof to station 2,236+35, where said center line crosses the boundary between the lands of C. B. Hoard and James Ferguson, with a bearing N. 1° 30′ E., which strip contains 4.51 acres. And we are of the opinion that for the strip described in the above paragraph numbered "First," the sum of four hundred dollars, and we ascertain and determine that the applicant shall pay said sum therefor, being $50 per acre for the lands and $66.66 for
20 damages, will be a just compensation and for damages to the residue of the lands of which the same forms part. In fixing this sum for these strips it is with the understanding that it is the purpose of the applicant to construct a retaining wall on the strip of 4.55 acres through the yard in front of the white frame dwelling-house on the upper side of the turnpike whenever, if ever, the applicant cuts into said strip in front of said house so as to make said yard liable to slides or slips.

And we report in reference to said strip of 4.55 acres, that if any part thereof belongs to the Ceredo Cemetery Association that said association is entitled to so much of the said sum of $400 as

will pay said association at the rate of $50 per acre for the proportion of said 4.55 as is owned by said association. And we are of the opinion that for the strip of 4.51 acres described in the above paragraph numbered "Second," and for damages to the residue of the lands of which the same forms part, the sum of six hundred and seventy-five dollars (being at the rate of one hundred and fifty dollars per acre) will be a just compensation. And
21 we ascertain and determine that the applicant shall pay said sum therefor.

Given under our hands and seals, this 28th day of April, 1880.

L. T. SMITH. [SEAL.]
LAMECH ADKINS. [SEAL.]
A. WORKMAN. [SEAL.]
JAMES P. KEYSER. [SEAL.]

L. T. Smith, $6.00, attendance and mileage.
J. P. Keyser, $6.00, " "
L. Adkins, $5.80, " "
A. Workman, $5.00, " "
Sheriff's fee, $5.70.

Afterward, to wit, on the 8th day of May, 1880, the following memorandum of receipt, in the words and figures following, was filed:

Memorandum.

On the 8th day of May, A. D. 1880, there was deposited in this office, and paid to me as the clerk of the Wayne County Court, by the Chesapeake and Ohio Railway Company, one thousand and seventy-six dollars and seventy-six cents, for which a receipt was given by me, and delivered to D. W. Emmons, as and for the sum of $1,075, the principal sum allowed in the within report, and $1.76 for interest thereon. Given under my hand as clerk, the day and year first above written. P. H. NAPIER, *Clk. W. C. C.*

22 Afterwards, to wit, on the 17th day of May, at 5 o'clock A. M. 1880, the following petition was presented and filed, which is in the words and figures following:

In the County Court of Wayne County, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Applicant and Plaintiff, *against.* C. B. HOARD, D. H. BALDWIN, THE CEREDO Cemetery Association, and S. Floyd Hoard, Defendants.	Petition to remove cause to District Court of the United States for the District of West Virginia.

On motion to take private property for public use.

To the Worshipful President and Justices of the said Court.

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully shows to this honorable court, that the matter and

amount in dispute in the above-entitled suit exceeds, exclusive of cost, the sum or value of five hundred dollars, that the controversy in said suit is between citizens of different states, that the petitioner was at the time of the commencement of this suit, and still is, a corporation created and organized under and by
23 virtue of the laws of States of Virginia and West Virginia, and a citizen of said states, and that D. H. Baldwin and C. B. Hoard were then, and still are, citizens of the State of New York, and that S. Floyd Hoard was then, and still is, a citizen of the State of West Virginia, and the Ceredo Cemetery Association was then, and still is, a corporation created and organized under and by virtue of the laws of West Virginia, and a citizen of said state. And your petitioner offers herewith a bond with good and sufficient surety for its entering in the District Court of the United States for the District of West Virginia, sitting at Charleston, on or before the first day of its next session, a copy of the record in this suit, and for the paying all the costs that may be awarded by said district court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record
24 herein to be removed into said district court, and it will ever pray, &c.

WM. H. HOGEMAN,
Attorney for Chesapeake and Ohio Railway Co.

Know all men by these presents, that I, Delos W. Emmons, responsible person for the Chesapeake and Ohio Railway Company, and Wm. H. Hogeman, his surety, are held and firmly bound unto C. B. Hoard, D. H. Baldwin, The Ceredo Cemetery Association, and S. Floyd Hoard, in the penal sum of five hundred dollars, the payment whereof well and truly to be made unto the said C. B. Hoard, D. H. Baldwin, The Ceredo Cemetery Association, and S. Floyd Hoard, or either or any of them, their heirs, successors, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet, upon these conditions: The said the Chesapeake and Ohio Railway Company having petitioned the County Court of Wayne County, State of West Virginia, for the removal of a certain cause therein pending, wherein the said the Chesapeake and
25 Ohio Railway Company is applicant and plaintiff, and C. B. Hoard, D. H. Baldwin, The Ceredo Cemetery Association, and S. Floyd Hoard are defendants, to the District Court of the United States for the District of West Virginia, sitting at Charleston. Now, if the said petitioner shall enter in the said district court, on or before the first day of its next session, a copy of the record of said suit, and shall well and truly pay all costs that

may be awarded by said district court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation be to void, otherwise in full force and virtue.

Witness our hands and seals, this 15th day of May, 1880.

DELOS W. EMMONS. [SEAL.]
WM. H. HOGEMAN. [SEAL.]

Approved by me as sufficient, May 17, 1880.

P. H. NAPIER,
Clerk of County Court Wayne County, West Virginia.

STATE OF WEST VIRGINIA,
WAYNE COUNTY COURT, CLERK'S OFFICE. } *ss.*

26 I, P. H. Napier, clerk of the county court of the county and state aforesaid, do certify that the foregoing is a true and perfect copy of the record and exhibits and plats in the case of the Chesapeake and Ohio Railway Company vs. C. B. Hoard and others, as appears on file and of record in my office.

Given under my hand, this 17th day of May, 1880.

P. H. NAPIER,
Clerk of County Court Wayne County, West Virginia.

And at another day, to wit, at a district court of the United States for the district aforesaid, held at Charleston on the 19th day of May, 1880.

This day the defendant, C. B. Hoard, tendered a plea in abatement to the jurisdiction of this court in this proceeding and the plaintiff objected to the filing thereof, and time is taken to consider of such objections, but such time so taken is not to operate to delay the hearing of the cause upon the part of the defendant.

The defendants are allowed 30 days in which to file ex-
27 ceptions to the report of commissioners in this cause.

And at another day, to wit, at a district court of the United States for the district aforesaid, held at Charleston on the 15th day of November, 1880.

This day the defendant, D. H. Baldwin, tendered his answer in this cause, which answer is ordered to be filed, and the plaintiff takes time to consider thereof.

And the defendants Samuel F. Hoard and the Ceredo Cemetery Association severally moved the court to remand this cause to the County Court of Wayne County and to strike the same from the docket of this court as to the said two last-named defendants and each of them; which motion the court takes time to consider.

The answer of the defendant D. H. Baldwin, filed as set out in the last preceding order, is in the words and figures following, to wit:

considered, is overruled, and the court refuses to remand this proceeding to said circuit court. And it appearing to the court that there is in the hands of the clerk of the County Court of Wayne County to the credit of this proceeding the sum of one thousand and seventy-six dollars and seventy-six cents, paid by the Chesapeake and Ohio Railway Company on the 8th day of May,
33 1880, it is ordered that the clerk of the County Court of Wayne County do pay over the said sum to the clerk of this court, to be held by him subject to orders to be made in this proceeding. The said clerk is ordered to loan out the said sum, when it comes into his hands, until the next term of this court, taking good personal security from the person to whom the same is loaned, and requiring the payment of legal interest on the amount loaned until payment.

And thereupon the defendant, C. B. Hoard, tendered a bill of exceptions herein, which being signed and sealed, is ordered to be filed as part of the record hereof.

The said bill is in the words and figures following, to wit:

Bill of Exceptions.

Be it remembered, that the defendant C. B. Hoard, at Spring term, 1880, of the court, tendered a plea in abatement, and moved the court to file the same, in the words and figures following, to wit:

District Court of the United States, District of West Virginia.

THE CHESAPEAKE & OHIO RAILWAY CO.
vs.
C. B. HOARD AND OTHERS.

34 And now comes the said C. B. Hoard, by Eustace Gibson and E. L. Buttrick, his attorneys, and saith that the said plaintiff ought not to have or maintain his petition removing this cause from the County Court of Wayne County to this court, and prosecute his suit herein, because, he says, that at the time the proceedings in said county court were commenced, he was, ever since has been, and still is, a citizen of West Virginia, and this he is ready to verify. Wherefore he prays judgment, &c.

C. B. HOARD.

Sworn to before me, this 19th day of May, 1880.

JASPER Y. MOORE, *Clerk.*

To the filing of which plea the plaintiff objected, which objection was, at the Spring term, 1881, argued and submitted to the court, and the court sustained said objection, and refused to file said plea. To which ruling and judgment of the court in sustaining the plaintiff's objection to said plea, and in refusing to file the same, the said defendant, C. B. Hoard, excepts.

And thereupon the said defendant, C. B. Hoard, tendered
35 another plea in abatement, and moved the court to file the same, in the words and figures following, to wit:

And now comes the said C. B. Hoard in proper person, and saith that the said plaintiff ought not to have or maintain his petition removing this cause from the County Court of Wayne County to this court, and prosecute the same herein against him, because, he says, that at the time the proceedings in said county court were commenced he was, ever since has been, and still is, a citizen of the State of West Virginia; and at the time aforesaid he was not, and never since has been, a citizen of the State of New York, and this he is ready to verify. Wherefore he prays judgment, &c.

C. B. HOARD.

STATE OF WEST VIRGINIA, }
KANAWHA CO. } *ss.*

Charles B. Hoard, the defendant in the foregoing plea, being duly sworn, says that the facts and allegations therein contained, so far as they are stated on his own knowledge, are true, and so far as they are stated upon information, he believes them to be true.

C. B. HOARD.

Taken, subscribed, and sworn to before me, this 23d day of May, 1881.

EDWARD B. KNIGHT,
Notary Public for Kanawha County, West Virginia.

36 UNITED STATES OF AMERICA, }
DISTRICT OF WEST VIRGINIA. }

This 26th day of May, 1881, personally appeared before me, Jasper Y. Moore, clerk of the District Court of the United States for the District of West Virginia, Charles B. Hoard, who, being duly sworn, deposes and says that the foregoing plea is true.

C. B. HOARD.

Given under my hand the day and year above mentioned.

JASPER Y. MOORE,
Cl'k Dist. Ct. U. S., D. W. V.

To the filing of which plea the plaintiff also objected, and said objection being argued and submitted, is also sustained, and the court refused to file said plea. To which ruling and judgment of the court sustaining the plaintiff's objection to said last-named plea, and in refusing to file the same, the defendant C. B. Hoard also excepted, and prays that his foregoing exceptions, and each of them, may be signed, sealed, and saved to him; which is accordingly done.

J. J. JACKSON. [SEAL.]

[Pages 37, 38, and 39, Plats.]

40 I, Jasper Y. Moore, clerk of the District Court of the United States for the District of West Virginia, certify that the foregoing is a true, complete, and correct transcript of the record and proceedings had in a cause now pending in my said court, at Charleston, in said district, wherein the Chesapeake and Ohio Railway Company is applicant and plaintiff, and C. B. Hoard and others are defendants.

In witness whereof I have hereunto subscribed my name and affixed the seal of my said court, at Charleston, this 15th day of October, 1881.

JASPER Y. MOORE,
Clerk Dist. Ct. U. S., District West Virginia.

Clerk's fee for making this record, $21.

SUPREME COURT OF THE UNITED STATES.

No.

SAMUEL FLOYD HOARD and THE CEREDO CEMETERY ASSOCIATION

vs.

HONORABLE JOHN J. JACKSON, Judge of the District Court of the United States for the District of West Virginia.

On Rule to show Cause why Mandamus should not Issue.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

This respondent, John J. Jackson, judge of the district court of the United States for the district of West Virginia, exercising circuit court powers, for return and answer to the rule awarded by your honorable Court on the 14th day of November, 1881, on the petition of Samuel Floyd Hoard and the Ceredo Cemetery Association, requiring this respondent to show cause why a writ of mandamus should not issue, commanding him to strike the cause of The Chesapeake and Ohio Railway Company, plaintiff, *vs.* C. B. Hoard, D. H. Baldwin, Samuel Floyd Hoard, and the Ceredo Cemetery Association, defendants, from the docket of respondent's court, so far as said Samuel Floyd Hoard and the Ceredo Cemetery Association are concerned, and remand the same to the State court from whence it came, respectfully shows: That if your respondent erred in overruling the motion made by the said Samuel Floyd Hoard and the Ceredo Cemetery Association, such error, as he is advised, cannot be corrected by writ of mandamus; and for this reason, if for no other, the mandamus prayed for ought not to be issued.

And for further cause why said writ of mandamus should not issue, as prayed for, respondent respectfully shows that said cause, in which said motion to remand was made and overruled, had been properly removed to, and docketed in, respondent's aforesaid court, and his said court had, and has, full jurisdiction thereof, and authority under the law to entertain and try the said cause, as well as

to the said Samuel Floyd Hoard and the Ceredo Cemetery Association, as to all other parties thereto—the same having been so removed and docketed under and by virtue of the act of Congress of 3d March, 1875, section 2, chapter 137—for the reason as alleged in the petition for removal, and as shown by the record filed with the petition on which this rule has been awarded, that the controversy in said cause was between citizens of different States.

Said cause was instituted by the Chesapeake and Ohio Railway Company in the county court of Wayne county, West Virginia, for the purpose of acquiring title to two strips of land, which, in the application of said company to said State court, are alleged to be owned by C. B. Hoard, who, in the petition for removal, is alleged to be a citizen of the State of New York. Said Chesapeake and Ohio Railway Company is a corporation created, organized, and existing under and by virtue of a contract made by the Virginia Central Railroad Company, a corporation of the State of Virginia, with commissioners appointed by the States of Virginia and West Virginia, and a sale and conveyance pursuant thereto, made under decrees of the circuit court of the city of Richmond, Virginia, and of the circuit court for the county of Kanawha, West Virginia, rendered in foreclosure suits in said courts: whereby, under and pursuant to the laws of Virginia and West Virginia, it became and is a corporation, having its principal office at Richmond, in the State of Virginia, and which, in respondent's opinion, should, for jurisdictional purposes, be considered and treated as a Virginia corporation, and not as a corporation of the State of West Virginia. But whether this opinion be correct or not, your respondent is advised that it would have been improper for him to sustain the motion to remand this cause.

In the application of said company to the State court, it is alleged that said company is informed that D. H. Baldwin, who, in the petition for removal, is alleged to be a citizen of the State of New York, claims a lien by mortgage on said two strips of land, and it is also alleged in said application that said company is informed that Samuel Floyd Hoard and the Ceredo Cemetery Association claim some interest in said strips of land, but that the nature of such interest is unknown to said company. Owing doubtless to this information, the said D. H. Baldwin, Samuel Floyd Hoard, and the Ceredo Cemetery Association were made parties defendant to said cause. There is, however, nothing to show that the alleged information is correct, or that the said Samuel Floyd Hoard and the Ceredo Cemetery Association make or have any, or if any what, claim to the said strips of land or either of them, or to any part thereof. They have not, nor has either of them, controverted the allegation made in the application of said company that said strips are owned by C. B. Hoard; nor have they or either of them, controverted the allegation made in the petition for removal, that the controversy in said cause is between citizens

of different States, although ample opportunity to do so has been afforded them. There is, therefore, nothing to show that either the said Samuel Floyd Hoard or the Ceredo Cemetery Association is an indispensable party to said controversy, or that the presence of either of them as a party is necessary to the complete determination thereof.

The entire cause was, therefore, in respondent's opinion, removable into his court, and it would have been improper to divide the said cause, or the jurisdiction thereof, between respondent's court and the State court.

It may be proper for respondent to state that the laws of West Virginia in relation to taking private property for public use in force at the commencement of the cause aforesaid, and since, are the following, viz: Section 18 of chapter 88 of the Acts of 1872–73, chapter 114 of the Acts of 1875, and chapter 18 of the Acts of 1881.

For the foregoing reasons your respondent asks that the mandamus prayed for be denied, and the rule which has been awarded against him discharged.

JOHN J. JACKSON,
Judge D. C. U. S. D. W. Va., exercising Ct. Court powers.

IN THE

Supreme Court of the United States.

No. October Term, 1881.

Samuel Floyd Hoard and The Ceredo Cemetery Association

vs.

Hon. John J. Jackson, Judge of the District Court of the United States for the District of West Virginia.

Petition for rule to show cause why mandamus should not issue.

PETITIONERS' BRIEF.

Statement of the Case.

This is the case of a motion made on behalf af Samuel Floyd Hoard and The Ceredo Cemetery Association for a mandamus to the presiding judge of the District Court of the United States for the District of West Virginia.

The petition on which the motion is founded sets forth that a cause is pending in said district court, wherein The Chesapeake and Ohio Railway Company is plaintiff, and C. B. Hoard, D. H. Baldwin, and these petitioners are defendants, said cause having been removed by the plaintiff from a county court of the State of West Virginia in which it originated, upon petition; that the plaintiff is in contemplation of law, as the petitioners are each in fact, a

citizen of said state; that upon removal of said cause to the district court, these petitioners filed pleas to the jurisdiction of said court, which said pleas were overruled, and jurisdiction assumed by said court; that motions were then made to remand said cause, so far as these petitioners are concerned, to the county court of said state, from which it came, but said motions were overruled, and jurisdiction assumed by said district court. It appears from the record filed with the petition, that the amount in dispute is less than $2,000. The prayer is for a mandamus commanding the judge of said district court to strike said cause from the docket of his said court, so far as the petitioners are concerned, and to remand the same to the state court whence it came.

POINTS.

The writ should issue.

"The supreme court shall have power to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under authority of the United States."—(Revised Stats. U. S., sec. 688.) The writ of mandamus, says Blackstone, "is in general a command issuing in the king's name, from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice." "It issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance."—(3 Black., 110.)

This court in a case before it, says, assuming the language of the Supreme Court of New York, "it," mandamus, "ought to be used where the court has established no specific remedy, and where in justice and good government there ought to be one."—(Ex parte Crane, 5 Peters, 190.)

The record plainly shows that the district court has no jurisdiction over the cause before it, so far as these petitioners are concerned, if at all. It is not a suit between citizens of different states, so far as they are concerned. The petition of the plaintiff for removal of cause, distinctly says that it is "a corporation created and organized under and by virtue of the laws of the States of Virginia and West Virginia, and a citizen of said states;" and it further declares, that said Samuel Floyd Hoard is a citizen of West Virginia, and said The Ceredo Cemetery Association is a corporation under the laws of West Virginia. This court has settled the question of the citizenship of the said Chesapeake and Ohio Railway Company by deciding, "where a corporation is created by the laws of a state, it is, in suits brought in a federal court in that state, to be considered as a citizen of such state, whatever its status or citizenship may be elsewhere, by the legislature of other states."—(13 Wall., 270, Railway Co. vs. Whitten.) Nor will the fact that one of the parties is claimed to be a citizen of a different state, give jurisdiction where it appears that said party has no interest, or is merely a nominal party. This is clearly established by analogy from the decision of the court in Walden vs. Skinner, 101 U. S., 577.

In view of above decisions, and the facts as disclosed by the record, it seems clear that the U. S. district court has no jurisdiction over the cause, so far as these petitioners are concerned. The remanding of the cause to the state court was a right of the petitioners, and it was the duty of the court to have done, as moved by them. It was not a matter of judicial discretion, but an act "pertaining to his office and duty," and the motion should have been granted. The amount in dispute is not sufficient to give the petitioners the right of review by this honorable court, and there seems absolutely no redress unless this honorable court intervenes in their behalf.

J. HOLDSWORTH GORDON,
Counsel for petitioners.

SUPREME COURT U.S.
FILED
FEB 28 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM 1881.

No. .

SAMUEL FLOYD HOARD AND THE CEREDO CEMETERY ASSOCIATION,

vs.

HON. JOHN J. JACKSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WEST VIRGINIA.

On rule to show cause why Mandamus should not Issue.

BRIEF FOR RESPONDENT.

WM. J. ROBERTSON,
Counsel for Hon. J. J. Jackson, Respondent.

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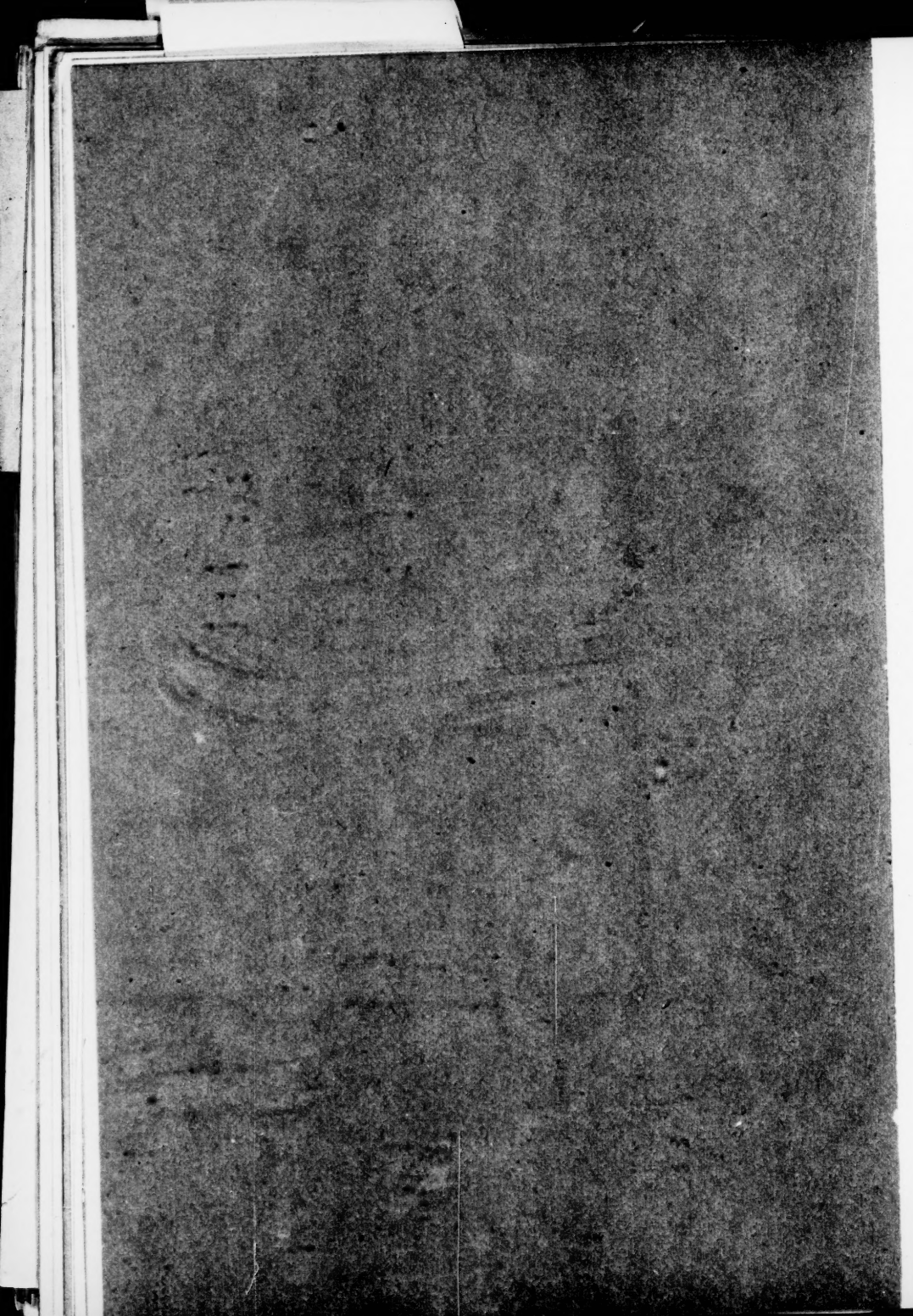

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The pending application is for a mandamus to the judge of the District court of the United States for the District of West Virginia, exercising Circuit Court powers, requiring him to strike from the docket of his court, so far as Samuel Floyd Hoard and the Ceredo Cemetery Association are concerned, the case, now on said docket, wherein the Chesapeake and Ohio Railway Company is plaintiff, or applicant, and C. B. Hoard, D. H. Baldwin, Samuel Floyd Hoard and

the Ceredo Cemetery Association are defendants; and to remand said case to the State Court from whence it came.

The case referred to is a proceeding instituted by the Chesapeake and Ohio Railway Company, in the county court of Wayne County, West Virginia, on the 6th day of October, 1879, to acquire title to two strips of land lying in said county, and required for its railway.

Of this proceeding, notice had been given to C. B. Hoard, D. H. Baldwin, Samuel Floyd Hoard and the Ceredo Cemetery Association, and on the 8th day of April, 1880, an order was made in the proceeding by the county court of Wayne County, appointing viewers to go upon the land and ascertain a just compensation therefor. The viewers appointed acted under this order, and made a report showing that in their opinion $1,075 was a just compensation for the two strips, as well as for the damages to the residue of the land of which said strips form part. This report was filed in the clerk's office of the county court of Wayne County, on the 8th day of May, 1880, and on the same day the Railway Company deposited with the clerk of said court, $1,076.76, the principal sum ascertained by the viewers as hereinbefore mentioned, with interest thereon from the date of their report to the date of the deposit. Under the law of West Virginia, said report was to lie in the office until the first day of the next term of the court thereafter, when, if no exceptions were taken and filed thereto, judgment was to be entered for the amount therein ascertained by the viewers; but if exception should be taken and filed, and when required by either of the parties, the compensation for the land was to be ascertained by a jury to be selected according to law.

Before the commencement of the next term of the said court, after the filing of said report, to wit: on the 17th day of May, 1880, the Railway Company filed its petition and bond, in the clerk's office of said court, for the removal of the proceeding to the district court of the United States for

the District of West Virginia, said court exercising Circuit Court powers; averring in said petition that, at the time of the commencement of the suit and of filing said petition, it was a corporation created and organized under and by virtue of the laws of the States of Virginia and West Virginia, and that D. H. Baldwin and C. B. Hoard were citizens of the State of New York, S. Floyd Hoard, a citizen of the State of West Virginia, and the Ceredo Cemetery Association, a corporation created and organized under and by virtue of the laws of West Virginia. On the 18th day of May, 1880, a copy of the record was presented to said district court, the same being then in session, and was entered and filed therein, and the case docketed in said court, to be proceeded with according to the act of Congress in such cases made and provided.

On the next day thereafter, to wit, on the 19th day of May, 1880, the defendant, C. B. Hoard, tendered a plea in abatement to the jurisdiction of the court, to the filing of which the plaintiff objected, and time was taken to consider the objections; but such time so taken was not to delay the hearing of the cause upon the part of the defendant. And the defendants were allowed thirty days within which to file exceptions to the report of the commissioners.

At the next term of the court thereafter, to wit, on the 15th day of November, 1880, the defendant, D. H. Baldwin, filed his answer disclaiming all interest in the land sought to be condemned; and, on the same day, the defendants, Samuel Floyd Hoard and the Ceredo Cemetery Association, severally moved the court to remand the cause to the county court of Wayne County, and to strike the same from the docket of the District court, as to them and each of them, which motion the court took time to consider.

At the same term, to wit, on the 17th day of November, 1880, C. B. Hoard "and others" tendered exceptions to the report of the commissioners in said proceedings, demanding "a jury to determine the damages, pursuant to section 18,

chapter 88, of Acts of 1872–'3;" which were ordered to be filed for future action thereon, "reserving to the said C. B. Hoard and the other claimants the right to a hearing and determination of the exceptions to the jurisdiction of the court, and of the motion pending to remand the case to the county court of Wayne County."

At the next term of the court thereafter, to wit, on the 26th day of May, 1881, the motion which had been made by the Ceredo Cemetery Association and Samuel Floyd Hoard to remand the proceeding, as to them, to the county court of Wayne County, being argued and considered, was overruled; the court refusing so to remand the same.

And on the same day, the matters arising on the objections of the railway company to the plea in abatement to the jurisdiction of the court which had been theretofore tendered by C. B. Hoard, having been argued and considered, the court sustained said objections and rejected said plea; and thereupon the said C. B. Hoard tendered another plea in abatement, which also was objected to, and rejected by the court; to both of which rulings of the court the said C. B. Hoard filed his bill of exceptions.

And thereafter, on the same day, the Ceredo Cemetery Association and Samuel Floyd Hoard moved the court to remand the proceeding to the Circuit Court of Wayne County, which motion was overruled, the court refusing to remand the same to said Circuit Court.

The only question that arises upon the pending application for a mandamus, is whether or not the district court shall be ordered by this court to remand the case, as to the Ceredo Cemetery Association and Samuel Floyd Hoard, to the county court of Wayne County.

It is tacitly conceded that the district court was right in overruling the motion to remand the case to the Circuit Court of Wayne County, no application being made for a mandamus requiring that to be done.

The correctness of the rulings of the court in rejecting

the pleas in abatement tendered by C. B. Hoard can only be inquired into upon writ of error. For all the purposes of this proceeding he must be taken to be a citizen of New York, and the case to be properly in the district court, so far as he is concerned.

The petition, which was filed by the railway company in the county court, on the 6th day of October, 1879, under which the proceedings for the condemnation of the land were commenced, alleges that the two strips of land sought to be condemned are *owned* by the said C. B. Hoard.

The only reference made in it to Samuel Floyd Hoard, the Ceredo Cemetery Association, and D. H. Baldwin, is in the following words, viz.:

"In the above described strips your petitioner is informed that Samuel Floyd Hoard and the Ceredo Cemetery Association claim some interest, but the nature of such interest is unknown to your petitioner.

"In the same strips your petitioner is informed that D. H. Baldwin claims a lien by mortgage, but the amount due thereon is to your petitioner unknown."

It will be observed that there is no allegation or averment of an actual interest in or claim to these strips of land by either the said Samuel Floyd Hoard, or the Ceredo Cemetery Association. The petition simply states that the petitioner is informed that they claim some interest, but that the nature of such interest is unknown to the petitioner—and in the same petition it is distinctly averred that both of the strips are owned by C. B. Hoard.

The statement as to D. H. Baldwin, is that the petitioner was informed that he claimed a lien by mortgage; but that the amount due thereon was unknown to the petitioner.

As already stated, said Baldwin has, since the case was removed to the district court, filed an answer disclaiming any interest, there being, as therein stated, nothing due under the mortgage which was held by him at the commencement of the proceedings.

The Ceredo Cemetery Association and Samuel Floyd Hoard have not, nor has either of them, up to the present time, shown what interest, if any, they have, or either of them has, in said strips of land, or in either of them.

At the time the petition was filed it was a doubtful question whether the condemnation would have to be made under chapter 114 of the West Virginia acts of 1875, or under chapter 88 of the acts of 1872–73.

As will be seen from the case of The Chesapeake and Ohio Railway Company *vs.* Hoard and others, 16 West Virginia Reports, 270, that question was then undetermined and in course of litigation.

The act of 1875 expressly required notice of an application to the court, for the appointment of commissioners to ascertain the value of lands proposed to be condemned, to be given, not only to the *owners*, of such lands, but also to all "*claimants and persons holding liens.*"

As giving notice to "claimants and persons holding liens," would not invalidate proceedings under the act of 1872–73, although such notice was not required by that act--and as the failure to give it would invalidate proceedings under the act of 1875, it was thought safer, in view of the doubt that existed as to the act under which the proceedings could properly be taken, to give such notice to all parties who, according to rumor, were claimants of any interest in the land sought to be condemned.

As will appear from the case, above referred to, in 16 West Virginia Reports, p. 270, the Court of Appeals of that State, on the 20th day of March, 1880, decided that condemnation proceedings could not be under the act of 1875; but must be taken under the act of 1872–73, chapter 88, only.

Under that act, as has been stated, there was no necessity to give notice to any party other than C. B. Hoard, the owner of the land, but notice having theretofore been given to the supposed claimants of interest in it, the proceedings were carried on without any discontinuance as to them, al-

though, as to them, they might, have well been thenceforward discontinued.

Such portion of the acts of Assembly of West Virginia as relate to this matter, will be printed and annexed to this brief.

ARGUMENT.

On behalf of the respondent it is contended:

First. That even though the district court may have erred in overruling the motion to remand, such error cannot be corrected by mandamus.

Whether or not it was proper to grant the motion, and remand the case, so far as the Ceredo Cemetery Association and Samuel Floyd Hoard were concerned, to the State court from whence it came, was a question, the determination of which was clearly within the jurisdiction of the district court. That the question submitted for its decision was whether it would be proper for it to continue to exercise jurisdiction in the case can make no difference. The court had the lawful power to decide that question, as well as any other that might arise in the progress of the case; and the motion to remand being made, it became its duty to decide it. *Ex Parte Parks*, 93 U. S., 18.

The object of the application, now made to this court, is to reverse the determination of the district court, that it *will* proceed to hear and decide the case that has been removed to it from the State court. This cannot be done by mandamus.

"A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, nor to reverse its decisions when made." *Ex Parte Burtis*, 103 U. S., 238.

"That" (the reversal of a decision which the inferior tribunal had jurisdiction to make) "is the office of a writ of

error, or an appeal, in cases to which such proceeding applies, but not of a writ of mandamus." *Ex Parte Flippin*, 94 U. S., 350. See also *Ex Parte Loring*, 94 U. S., 418; *Ex Parte Perry*, 102 U. S., 183.

In the case of *the Baltimore and Ohio R. R. Co. vs. Koontz and others*, decided at the present term, Chief Justice Waite, delivering the opinion of the Court, says:

"When the suit is docketed in the Circuit Court the adverse party may move to remand. If his motion is decided against him he may save his point on the record, and after final judgment, bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the State court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here, by writ of error or appeal, for a review of that decision, without regard to the amount in controversy. (Babbitt *vs.* Clark, 103 U. S., 106.)"

The fact that the amount in controversy in this case is not sufficient to give this Court jurisdiction on a writ of error furnishes no reason why it should issue a writ of mandamus.

In fixing the minimum amount for which writs of error can be sued out, Congress has indicated its purpose to make the decisions of the inferior courts *final* in cases in which less than that amount is involved. It would be strange indeed if it should be held that by thus indicating this purpose, Congress has conferred upon parties a right which would not otherwise exist, to have these very decisions reviewed upon writs of mandamus.

As was said by Mr. Justice Bradley, in delivering the opinion of the Court, in *Ex Parte Parks*, 93 U. S., 21:

"It having been held that the regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error only in cer-

tain specified cases, the implication is irresistible that those errors and irregularities, which can only be reviewed by appeal or writ of error, cannot be reviewed in this court in any other cases than those in which those processes are given."

And by Mr. Justice Clifford, in delivering the opinion of the Court in *Ex Parte Newman*, 16 Wallace, 168.

"Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right; and it is insisted that they ought on that account to have the remedy sought by their petition. Mandamus will not lie, it is true, where the party may have an appeal or writ of error; but it is equally true, that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given, save in patent and revenue cases, except where the sum or value exceeds two thousand dollars; but the writ of mandamus will not lie in any case to a subordinate court, unless it appears that the court of which complaint is made refused to act in a matter within the jurisdiction of the court, and where it is the duty of the court to act in the premises."

And in the case of *Ex Parte The Detroit River Ferry Company*, decided at the present term, (the opinion in which, as published in the Chicago Legal News, has been seen by the writer of this brief since the foregoing portion of it was prepared,) it was held that the fact that the amount was not sufficient for an appeal to this Court afforded no ground for relief by prohibition.

Chief Justice Waite says:

"If there is jurisdiction, and no provision for appeal or writ of error, the judgment of the trial court is the judgment of a court of last resort, and concludes the parties. It rests with Congress to decide whether a case shall be reviewed or not."

For the reason that the writ of mandamus cannot be used

as a writ of error, it is respectfully submitted that the rule which has been awarded should be discharged.

Second. The motion to remand the case to the State court, so far as the Ceredo Cemetery Association and Samuel Floyd Hoard were concerned, was properly overruled.

1st. Because, under the act of 3d March, 1875, suits cannot be severed, so as to remove some of the controversies to the Federal court, leaving others in the State court for determination. The removal of a separable controversy operates to transfer the whole suit to the Federal court.

Barney vs. Latham, 103 U. S., 205.

2d. It may well be insisted that the entire controversy in this case is really between citizens of different States, viz: between the Railway Company and C. B. Hoard; the other parties not appearing to have any actual interest in it. But if it be conceded that there is a controversy with the other parties also, there can be no doubt that there is in the case a controversy wholly between the Railway Company and C. B. Hoard, and which can be fully determined as between them, so that the case certainly comes within one or the other of the two clauses of section two, of the act of 3d March, 1875; and under either of them, the removal brings the entire suit, and all the parties to it, from the State to the Federal court.

The fact that there may be proper, but not indispensable, parties who are citizens of the same State with the party seeking the removal, if there be but one controversy—or if there be several controversies, some of which are between citizens of the same State—does not affect the right of removal if in the one case the only indispensable parties to the only controversy in it are citizens of different States; or if, in the other case, there is at least one of several controversies which is wholly between citizens of different States.

Removal Cases, 100 U. S., 457.
Walden vs. Skinner, 101 U. S., 588-9.
Barney vs. Latham, 103 U. S., 205.

In this case the proceeding was instituted by the Railway Company for the purpose of acquiring lands owned by C. B. Hoard; and the record shows that the Railway Company is a citizen of West Virginia, and C. B. Hoard a citizen of New York.

C. B. Hoard, as the owner of the land, was made a party to the proceeding; and the Ceredo Cemetery Association, Samuel Floyd Hoard and D. H. Baldwin were also made parties, as persons who might claim to have some interest in it. Under the West Virginia act of 1875, it was proper that these possible claimants of an interest in the land should be made parties, and they were made so, as has been hereinbefore stated, because it was not then known that the act of 1875 was not the act under which the proceeding should be taken.

It has since been decided by the West Virginia Court of Appeals, in the case of the Chesapeake & Ohio Railway Company *vs.* Hoard and others, (16 West Virginia Rep., 270,) that the act of 1875 was not the act under which the proceeding should be taken, but that it must be had under the act of 1872–3. The proceeding which had been instituted was accordingly thereafter carried on under and pursuant to the act of 1872–3, except only that it was not discontinued, as it might have been, as to all of the parties except C. B. Hoard—that act not requiring any party but the owner of the land to be made a party to the proceeding. *B. & O. R. R. Co.* vs. *P. W. & Ky. R. R. Co.*, 17 West Virginia Rep., 812.

By the failure to discontinue the proceedings as to these parties, an opportunity to which they were not legally entitled has been afforded them to set up any claim they or either of them may have to the land sought to be condemned. One of them (Baldwin) has disclaimed any interest; the other two (the Ceredo Cemetery Association and Samuel Floyd Hoard) have remained mute as to any interest they, or either of them, may have. The allegation of the

railway company, in its original petition, that the land was "*owned*" by C. B. Hoard, has not been denied, and neither of the other parties has set up any claim to an interest in it.

Even if the proceeding were under the act of 1875, so as to make them proper parties, they could not be considered otherwise than as mere nominal parties. Before they could claim to be such parties as to be entitled to ask for the case to be remanded to the State court, it would be necessary for them to show the nature and extent of their interest, if any they have, so as to enable the court to determine whether or not it is of such character, and so blended with that of C. B. Hoard, as to make them indispensable parties to the determination of the controversy between him and the railway company. This they have not done or attempted to do; so that, if the proceeding had been under the act of 1875, it would have been proper to overrule their motion to remand the case. *A fortiori*, was it proper so to do, the proceeding, in fact, being under the act of 1872–3, which does not require them to be made parties.

Third. In the answer to the rule the opinion is expressed that the Chesapeake & Ohio Railway Company should, for jurisdictional purposes, be treated as a corporation of the State of Virginia, and not as a corporation of the State of West Virginia.

It is believed that this opinion would appear to be correct if the facts relating to the organization of the company were before the court.

But it is conceived that the question cannot properly be raised under this rule, inasmuch as the company, in its petition for the removal of the case, has described itself as being a citizen of West Virginia, as well as a citizen of Virginia. The point, therefore, will not be insisted upon, and it is conceded that, for the purposes of this case, the company must be treated as a citizen of West Virginia.

Respectfully submitted by—

WM. J. ROBERTSON,

Counsel for Hon. J. J. Jackson, Respondent.

From Acts of West Virginia, "1872–73, *Chapter* 88."

Title.—"*An act* to provide for the incorporation of associations that may be organized for the purpose of constructing railroads, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized."

"Section 18. If any such corporation shall be unable to agree with the owner for the right of way, or for the purchase of any real estate required for the purposes of its corporation, or the transaction of its business, or for its deposits, station buildings, machine and repair shops, or for right of way, or any other lawful purpose connected with, or necessary to, the building, operating, or running of said railroad and branches, such corporation may acquire such title in the manner as hereinafter provided, viz: the court of any county wherein the land or material to be taken may be, upon application therefor, shall appoint five disinterested persons, (any three of whom may act,) for the purpose of viewing and ascertaining a just and equitable compensation for the quantity of land actually taken by said railroad corporation, (but in no case shall the court appoint any person or persons through whose land said railroad is to pass, nor any person interested in the construction of said railroad,) and the sheriff of the county, after such appointment is made, shall summon the said viewers to meet on the land at such time as they may appoint, within thirty days after such appointment, giving twenty days' notice to the parties interested, unless such parties shall be non-residents of this State, in which case notice shall be given to such non-residents, by publication, for four successive weeks in some newspaper published in some county through which it is proposed to construct such railroad, and if none be so published, then in some other newspaper published in this State; and such viewers shall not meet for the purposes of their appointment until the publication herein prescribed shall have been completed. The viewers aforesaid shall, before proceeding to perform the duties aforesaid, take an oath before some person authorized to administer an oath, that they and each of them, will honestly, fairly and impartially ascertain and determine the amount said railroad corporation shall pay for the land actually taken as aforesaid, and return their report, signed by them, to the clerk of the court prior

to the first day of the next term thereafter, wherein the proceeding is pending, setting forth therein the amount to be paid for the land so taken, or to be taken, by the said railroad corporation. And in estimating the value or damages on account of the land actually taken, the commissioners or jury, as the case may be, shall determine its actual value, without reference to any prospective enhancement by reason of the construction of any work for which the land is to be taken, and shall not diminish the value by reason of such construction; and in all such cases the value or damages as aforesaid shall be determined by the actual and true value of the land to be taken. On said first day of said term, the said court shall direct judgment to be entered on said report for the amount therein ascertained and determined by said viewers, if no exceptions be taken and filed, but if exception be taken and filed thereto, and when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders, selected according to law. The right is hereby given to said railroad corporation to object, and its objection shall be sustained, to any juror who may be an owner or interested in land over or through which said railroad will pass. The cause, or proceeding, shall be tried as any other cause in said court, and the said viewers, as well as the jury aforesaid, who may try the cause or proceeding, shall, by their award or verdict, as the case may be, ascertain and determine the amounts to be paid by the railroad corporation for the land actually taken, and no more; and the damages to the residue of the tract, if any, may be offset and compensated for by any peculiar benefit to said residue which may arise by reason of the construction of said railroad or any work necessary for the running and operation of the same."

"*From Acts of West Virginia*, 1875, *Chapter* 114."

"*An act* amending certain sections of chapter forty-two of the Code of West Virginia, for taking lands for public purposes without the owner's consent."

"Section 3." (As amended by the act of 17th February, 1879, acts 1879, page 13.) "In any case in which real estate may be lawfully taken, application by petition may be made to th circuit court or county court of the county in which

such real estate is situated, to appoint commissioners to ascertain a just compensation to the owner of the estate proposed to be taken, and if a tract of land lie partly in one county and partly in another, the application as aforesaid in relation thereto may be made in either county; and when land is to be taken for public buildings to be erected by the State, or to be taken for the use or necessary enjoyment of any building erected by the State for any of its institutions, the circuit court shall appoint commissioners residing in some county other than that in which the land proposed to be taken is situated; and said appointment shall be made in accordance with the provisions of this chapter."

"Section 4. The proceeding may be instituted jointly against all the owners of real estate proposed to be taken, lying within the county, including tracts lying partly therein, and partly in an adjoining county; or it may be instituted against the owners of one or more parcels, whether any of the said owners have a privity of estate therein or not."

"Section 5. The application must be by petition, in writing, and shall describe with reasonable certainty the real estate proposed to be taken, and shall state (so far as they are known to the applicant) the names of the owners of each parcel and the nature of their respective interests. If there are any liens on said estate, created by judgment, deed of trust, or otherwise, or conflicting claims thereto, the petition shall state the nature and amount of such liens and claims and the names and residences of the persons holding the same, as far as they are known. The petition shall also state the purpose to which said estate is intended to be appropriated, and may state the sum of money, if any, which the applicant has offered or is ready to pay therefor to the owner of each parcel.

"Section 6. Of such application ten days' notice shall be served on the said owners, claimants, and persons holding liens, and the notice may be given either before application is presented or afterwards. But where the owners of all or any part of the real estate proposed to be taken, or the persons holding such liens or conflicting claims, or any of them, are not in the county, or are unknown to the applicant, the notice as to them, instead of being thus served, may be given by advertisement, containing a specific description of the property in which they are interested that is proposed

to be taken, and stating the purpose to which it is inten
to be appropriated, and the time and place at which a he
ing will be asked for upon the said application, wh
advertisement must be published at least once a week
four weeks successively in some newspaper printed in
county, or, if none be printed therein, then in some ne
paper of general circulation in the county, and must a
be posted at the front door of the court-house of the cou
four weeks at least before the hearing."

402

In Supreme Court of the United States.

The Richmond Mining Company of Nevada,
Plaintiff in Error.

vs.

The Eureka Consolidated Mining Company,
Defendant in Error.

No.
Writ of Error.

ORAL ARGUMENT,

(ABRIDGED,)

—OF—

HARRY I. THORNTON,

For the Eureka Company.

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ORAL ARGUMENT

(ABRIDGED)

OF MR. H. I. THORNTON, FOR THE EUREKA COMPANY.

MAY IT PLEASE THE COURT:

The counsel on the other side has first contended that this limestone zone, described in the Findings, is not a lode or ledge of rock in place bearing valuable minerals, as found by the Court, but that the Richmond ore-body within it is a vein or lode in the true acceptance of the term.

The 4th Finding in the law case describes specifically the formation containing the ore between the walls of quartzite and shale, and concludes that it is a lode or ledge of metal bearing rock in place, within the meaning of those terms as used by practical miners and as understood by those familiar with the subject of mining residing in the mining regions of the country.

The finding in the law case, if sufficient, is all that should be considered by the court in order to confirm the judgment and decrees of the court below.

I understand the sufficiency of the lode finding to be attacked *only* in this one point, that the Richmond is a fissure vein by itself, within the limestone.

The finding is that it is not; and that the ores in the limestone are found as large ore-bodies in chambers, or as small ore-bodies, vuggs and grains.

The Circuit Judge and the District Judge who tried this case with Mr. Justice FIELD in the court below, experienced in mining law and presiding in a mining section, have since

passed upon such a question in the case of *Mt. Diablo Company* vs. *Callison*, from Columbus District in Nevada. There the zone was different from this one; it had in it regular fissure veins, and, distinguishing between that case and this, they say: "*For while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name lode, the true fissure veins within its limits.*"

Brief of Messrs Wilson & Wren, page 21.

Now, no witness and no counsel for the Richmond has ever said that any other ore body in this limestone is a vein or lode or ledge, except the one they claim for the Richmond.

Look at the scattered ore bodies of the Eureka on the map: see their irregular shapes and various positions in the limestone. How could any vein or lode be made out of them, or any of them, except as made by this finding? The ore bodies along in the Champion and Buckeye have linear development: but counsel on the other side say they give out and have no connection below with any source.

The Finding is: "*Throughout this altered zone of limestone, mineral is found in the numerous fissures, caverns and cavities, and in the loose material of the rock in various forms, appearing sometimes in a series or succession of ore-bodies, more or less closely connected, sometimes in apparently isolated chambers, and, in others, in small bodies, vuggs, and in scattered grains* Although barren limestone sometimes intervenes, the mineral is generally diffused through the zone so as to render the whole mineralized matter metal bearing rock. Bodies of ore appear in croppings, on the surface, at various points throughout the whole length, exceeding a mile, from the Jackson to the Richmond mine, along which line of croppings various claims have been located by miners." In the Mt. Diablo-Callison case, they

found true fissure veins extending along in the zone—here they find irregular ore-bodies in the zone. The definition of a true fissure-vein has been given, and the statement of Van Cotta has been cited, that where you find one vein you will find others accompanying it. That is quite natural, because the dynamic force which makes the one fracture will make others—generally extending in the same direction, and even crossing each other and cutting different kinds of rock, if they are adjacent to each other and within the range of the operating force. That is all referable properly to districts like Columbus District and Bodie District in California, (from which came the Noonday-Orient case, cited in brief of Messrs. Wilson and Wren, p. 21, where Judge Sawyer defines a true fissure-vein, no other veins or lodes being found in that District, and, therefore, no modification of the sharp definition being called for,) and to Fahlband's described by Van Cotta; but how does it all affect this state of things before the court? Where the rock is sedimentary—where the fracturing was also a *crushing* done in the upheaval—where no fissure extends into or beyond the quartzite or slate—and where it is not contended by counsel or witnesses for the Richmond that in the whole zone there is any other thing like a vein or lode except this Richmond phenomenon; and where this Richmond if a separate vein is made right at the end of and under the Eureka ore-bodies.

And if this Richmond ore-body is a separate vein, what is its length; where is its top or apex? As shown at its cropping at the surface, it is about 15 or 20 feet long on its top. Whoever heard of such a vein as that?

The attempt is made to designate it as a pipe vein.

In answer to that, and further to show that a pipe-vein is only another name for a pipe or body of ore in a vein, I refer to the cross-examination of Prof. Whitney.

Record Eq. Cases, pages 426–430.

Practically it would be impossible to work and mine the ores of this limestone zone, unless it is held as one lode or ledge; for different claimants to be digging around for the ore-bodies would make inextricable confusion.

In answer to a suggestion of Mr. Justice MILLER, as to a patent less wide than the lode, taking the entire width of it, I make this explanation of argument in brief on file.

Suppose lode 300 feet wide on surface with three patents parallel to each other, each 100 feet wide; and that the lode has dipped beyond the side lines of all the patents, and that in it there is a body of ore from wall to wall, 150 feet wide, and the walls dipping at different angles: how would it be divided? What would be the dip of the line splitting it in two? And suppose, between the surface and this ore-body, but outside the side lines of all the patents, the walls of the lode had come together with a mere seam between them, and then widened out to enclose the ore-body; how would the ore-body be divided? Where the ledge is less than 100 feet wide the oldest patent right would take it all, but where more, the difficulty seems impossible to solve in practice unless the oldest patent-right is held to embrace the entire width of the lode.

While there is a definite description of a fissure vein given by all authors, and quoted and relied on by counsel for the Richmond, in this case, viz: a fissure filled with mineral; yet, I contend that the word vein or lode was never accurately used in Geological literature as alone applicable to such a formation, but has always been indiscriminately used as applicable to various forms of deposits, and to such a form of deposit as this is.

Von Cotta, Prime's Translation, page 155: eighth line from top, speaking of Silbernaale Groupe, District of Clausthal: "The whole group consists essentially of but one *lode*, whose breadth varies from one to fourteen fath-

oms. Its matrix is predominantly so-called Ganthonscheifer, (Vein Clay Slate,") as limestone is the matrix here.

Foot note on same page reads;

" According to a careful examination made by the author, in 1864, the Gangthonschiefer is nothing more than a portion of the wall rock (clay slate) which has been altered and impregnated with ores."

Page 178: Describing iron lodes at Steel Mountain at Siegen, Germany, he says: "Schulze says this deposit is neither a vein nor a bed, neither does it coincide with the idea of a stock work. It appeared to me to be a broad but irregular vein."

Page 179: " Within this vein of conglomerate there occurs a lode of hematite."

Also Vide testimony of Raymond, Record Eq. cases, p. 222, 223, citing pages 182, 185, 252, 254, 269, 332–3–4, 338, 431, 479, 497 of Von Cotta.

Also, Record, p. 223, citing p. 70 of the book of Gaetzschmann: " Veins are tabular ore deposits; fissure spaces filled, *or at least comparable to such*, which ordinarily differ with the stratification or otherwise distinguish themselves by their characteristics."

Also, Prof. Whitney, as quoted by Raymond, Record Eq. cases, pp. 224–5–6, from Metallic Wealth of the United States, pp. 40, 187, 189, 190, 273, 302, 303, 312, 323, 324, 347, 361, 365, 370, 373, 374, 377, 378, 395, 412, 414, 432.

Also as quoted, pp. 39 and 40, of brief on file.

Also, Record Eq. cases, p. 595, where Prof. Whitney testifies that Cinnabar is never found in regular fissure veins, but in masses not connected regularly together.

On page 16 and 17 of my brief, I have quoted from Dr. La Neve Foster, where he called a band of altered rock—a tabular mass—the Great Flat Lode, and says that *miners* so called it, though the definition of geologists is too narrow for it.

When Congress, in the act of 1872, in Sec. 3, used the word *ledge* after having before used the words *vein* and *lode*, in the act of 1866, and in that act of 1872, was it not with the purpose and intention of embracing every form of deposit, except *placers?*

Does it not shew an attempt to embrace every form of deposit except placers? And this word *ledge*, so used, exactly describes the limestone rock in place bearing the valuable minerals.

As the object was to sell all mineral deposits, why should the legislature not have included vein-like *seggregations* and vein-like *impregnations* and vein-like *beds*, as well as true fissue veins and placers?

In ascertaining how wide a meaning the legislature intended for the words *vein, lode, and ledge*, the Court below itself called Prof. Whitney to describe the forms in which cinnabar is found—for the act says veins or lodes bearing gold, silver, cinnabar, &c.

If the words vein, lode or ledge were not used to get in everything (except placers), seggregations and impregnations, two kinds of ore deposits mentioned by Von Cotta, and cinnabar, could not be located and purchased.

But counsel on the other side say that the description of this lode of rock in place, by the court below, would be applicable to a placer. Brief of Wilson and Wren, p. 31.

How can a ledge of metal bearing rock, as they call this, be considered a placer?

Mr. Wilson contends that as the Richmond location was made under the Act of 1866 and is older than the Champion, and as all rights under that Act were reserved by the Act of 1872 under which the Richmond patent was applied for and issued, they are entitled to the patent end lines for all ancillary lodes, that is, for lodes other than the original lode, having their top or apex within the Richmond sur-

face lines, which lodes were allowed under the Act of 1872, and to end lines on the original lode at right angles to its course, which, they claim, is different from the course of the Champion lode.

Could it ever have been intended in an act to settle titles and grant *certain* premises that this double set of end lines should exist?

I refer to this large map (that of the Richmond), which is a part of the findings, and which marks the line of the quartzite south of the Champion, to show that the end lines of that patent are as found (finding 17th)—at right angles to the course of the lode.

It is argued by counsel on the other side that when in finding 4th the court says this lode extends in a southeasterly and northwesterly course, it means absolutely southeast and northwest. But this is not the law when it appears on the face of the findings from other parts of the findings that exact northwest and southeast are not intended.

As counsel for the Richmond have wandered off into the evidence in the equity cases I will follow them on a few points.

It is stated in the Finding that the quartzite and shale are about 500 feet apart on the surface of the Eureka claim, and on the surface of the Richmond about 800 feet—that is by measurement over the top of the hill—the limestone rising up higher than the quartzite and shale, and forming the crest of the hill, so that the greatest width or thickness, that of the Richmond, is about 450 feet measured through horizontally from the top of the shale at the surface to the top of the quartzite at the surface.

Read p. 59, folios 70, 71.

This does not compare with the much greater width of the Comstock.

Von Cotta says there are lodes several hundred feet thick.
(Prime's Translation, page 26, paragraph at bottom.)

The finding also states that at the easterly end of the zone, these walls of quartzite and shale approach so closely as to be separated by a bare seam less than an inch in thickness. They so approach each other in the Jackson mine—the extreme southeastern mine on the zone—thence they separate in their course to the northwest, to the width mentioned, in the Eureka and Richmond. Where so close together in the Jackson, there is ore between them from wall to wall. A body of ore is also found in the K K., on the 2nd and 3rd levels, from quartzite to shale, where they are over 200 feet apart. And this body of ore at the Potts Chamber is from quartzite to shale, where they are about 230 feet apart.

Record, Eq. cases pages 214, 215, folios 329, 330.

How can this fail to be one lode, or ledge, when we thus find bodies of ore in it at great distances from each other extending from wall to wall?

By agreement we called five witnesses on each side, scientific and practical mining experts, to describe this locality and to give, when proper, their opinion based upon the facts. The Eureka witnesses were Read, Keyes, Rossiter W. Raymond, Sterry Hunt and James; those of the Richmond, Wescoatt, Prof. Whitney, Hague, Ashburner and Clarence King.

On the maps, observe the ore-body within the lines of the Margaret or Lupita, drawn vertically down, called the Eureka fifth level ore-body, because found at the west end of the Eureka fifth level. It is about 400 feet below the surface and rests upon the quartzite. The Margaret or Lupita surface lines, are on the limestone zone. The surface lines of the Utah, Artic and Atlantic locations, are north of the shale.

This fifth level ore-body was stated by Mr. King, to extend down along the workings, shown on the maps to the sixth and seventh levels of the Eureka, and then along the workings and across the line *WX* extended to point marked 48 on Wescoatt's map at the end of the Richmond fourth level. Record, Eq., cases, page 552, folio 895 to page 554 in folio 897.

Ibid., p. 560, folio 907;

Brief, pp. 27, 28.

Our five witnesses testified that they followed this ore-body down along the quartzite from the 5th level to the 9th level in the Eureka, and on to its connection with the Pott's chamber.

Brief, p. 28. See Eureka map.

It was asked by the Court, of Mr. Wilson, if there was any ore connection between the Pott's chamber, and the ore chamber within the Champion lines? The body of ore of the Pott's chamber is developed and followed up on the quartzite in workings in the Eureka, to and about 60 feet above the 5th level in the Margaret. From that, there is no working on up to the Champion ore-body, and consequently, no following of the ore between these points. But there is ore at the end of the Eureka 3d level going west, marked 3 P on Read's map within the lines of the At Last. Just before the trial, all these works of the Eureka were pressed with great activity for development and proof, and this 5th level ore body discovered and followed down, which could be rapidly done, because the 5th, 7th, 8th and 9th levels were far extended to the west; but there was not time to carry out the 3d and 4th levels to the west end of the ground, and we stopped them at the trial, and must stop with the testimony of what they showed at the time of the trial.

There is also a body of ore in the Lookout just beyond our west line at the top of and down the "winzes", so

marked on Read's map, some 100 feet below the surface. The quartzite dips at an angle of 45°, and lays under the Champion ore-body, the Lookout ore-body at "winzes" and the Margaret ore-body. Between the quartzite and the limestone is a natural contact fissure—a crevice—at all points; they are dissimilar rocks and do not interweave or, intermingle: they are sedimentary rocks,—the quartzite is first laid down, and then the limestone, in stratified form, on top of it; then came the upheaval and the crushing of the limestone by the harder rock, the quartzite. Along that fissure or crevice the mineral liquids and vapors must have come up from the laboratory below, and would, at places, branch out from it into cracks and cavities in the broken limestone above the quartzite, even on up to the overhanging shale, and settle in cavities in the limestone which happened to be next to the quartzite; but everywhere depositing a trace along its natural opening and channel on the face of the quartzite. Surface waters, charged with carbonic acid, in making their way down through the soluble mass of limestone, forming cavities and precipitating minerals, would also tend to the underlying quartzite which they could not penetrate, and along which they would find their way.

The actual tracing is not necessary if the facts proven, and in sight, convince the mind that the tracing exists and that there is a contact fissure or vein connection. The Champion ore-body is in the limestone above the quartzite. If it did not come from below along the quartzite, up from the 5th level ore-body, did it come across from the Richmond or the Buckeye, or is it suspended in limestone without any connection with any source of supply?

The object of the Richmond was to prove no connection between the Champion ore-body and the Richmond at or near the surface, and no connection between it and the 5th level ore-body. So Mr. Wren asked Prof. Whitney if the

croppings at the Champion are the same as the Eureka 5th level, and he could not say—had formed no opinion.

Record, Eq. Case, p. 426—just before cross-examination.

He could not deny it.

As to the continuity of the lode or ledge near the surface from Richmond cropping to the Jackson.

Read testified that the top or apex of the lode is through the Tip Top, Richmond, Champion, Buckeye, K. K., Phœnix, and Jackson.

Record, Eq. Cases, p. 97, folio 133.

Looking upon his map of the Eureka, you see the surface ore-chamber in the Champion. From that the Champion tunnel runs out to another ore-chamber, which is some few feet below the surface, and one end of which is at the top of the Shaw Winze. Then the Shaw Winze is 67 feet deep in ore, and to the west side of it is another ore-chamber; from the bottom of it (the Shaw Winze) a drift runs in ore to top of "winzes," and those winzes go down 170 feet to the Lizzette Tunnel, in ore all the way down except the bottom 30 feet. Then our witnesses testify to ore commencing in the Lizzette Tunnel 60 feet from the bottom of the "winzes," and extending to the large ore-chamber of Richmond.

Then another Richmond ore-chamber is put down on the map under letter "D," in word Richmond, and extending past a point under south side line of Lookout, equidistant from its end lines.

Record Eq. Cases, pp. 61, 62, 63, folios 74–77;
Ibid, pp. 318, 319, folios 503, 504.

Then ore was found at Iron Shaft, coming up to the surface.

Record Eq. Cases, p. 61, folios 73, 74.

This makes an actual connection in ore between the Champion croppings and the Richmond, except for 60 feet and if the body of ore through which the "winzes" go down were explored by any work towards the west, it seems certain that it would be found to connect with the Richmond ore-body.

It is *very strange* that a vein of ore should extend along through Jackson, Phœnix, K. K., Buckeye, and Champion, in linear course, and there all at once terminate, just for the Richmond *pipe* to be formed at the end of it.